CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918

No. 404

POSTAL TELEGRAPH-CABLE COMPANY, APPELLANT,

vs.

CHICAGO GREAT WESTERN RAILROAD.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

FILED APRIL 10, 1918.

(26,426)

(26,426)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 959.

POSTAL TELEGRAPH-CABLE COMPANY, APPELLANT,

vs.

CHICAGO GREAT WESTERN RAILROAD.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

United States Circuit Court of Appeals.

FOR THE SEVENTH CIRCUIT.

OCTOBER TERM, A. D. 1917.

No. 2548

CHICAGO GREAT WESTERN RAILROAD COMPANY, A CORPORATION,

Appellant,

vs.

POSTAL TELEGRAPH-CABLE COMPANY, A CORPORATION,

Appellee.

MR. JOHN BARTON PAYNE,
MR. RALPH M. SHAW,
MR. GEORGE A. KELLY,

Counsel for Appellant.

MR. JACOB E. DITTUS,

Counsel for Appellee.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

2 Pleas in the District Court of the United States for the Northern District of Illinois, Eastern Division, in Chancery sitting, at the United States Court room, in the City of Chicago, in said District and Division, before the Honorable Evan A. Evans, one of the Judges of the United States Circuit Court of Appeals for the Seventh Circuit, sitting by designation, in the District Court of the United States for the Northern District of Illinois, on Friday, the fourteenth day of September, being one of the days of the September Term of said Court, begun Monday, the third day thereof, in the year of our Lord one thousand nine hundred and seventeen, and of the Independence of the United States of America, the one hundred and forty-second year. Placit

Present:

Hon. Evan A. Evans, Circuit Judge, Presiding:
John J. Bradley, United States Marshal for said District and
T. C. MacMillan, Clerk of Said Court.

1916. 3 And on to-wit: the thirtieth day of October, 1916, in the record of proceedings in said entitled cause, before the Hon. Kenesaw M. Landis, District Judge, appears the following entry to-wit:

Chicago Great Western Railroad Company,
vs.
Postal Telegraph-Cable Company. } 735.

This cause having come on to be heard on the motion of the defendant herein, notice whereof having been given to counsel for complainant on the 28th day of October, A. D. 1916, and upon the verified affidavit of Edward Reynolds filed herein on this date and on the papers, pleadings and proceedings herein and consent of the solicitors for complainant herein, now, on motion of Jacob E. Dittus, solicitor for defendant,

It is ordered that the complainant be and it hereby is permitted within twenty days from the date of service upon its solicitors of a copy of this order to interpose a reply to any new or affirmative matter set forth in the answer herein, and,

It is further ordered that if such reply be interposed then the defendant shall be at liberty to make such further application to this court as it may deem best, and

It is further ordered that if no such reply be interposed within said twenty days, then that the facts alleged in said answer shall be deemed true and that the point of law involved in this case shall be called up and disposed of before final hearing.

4 And on to-wit: the tenth day of November, 1916, in the record of proceedings in said entitled cause before the Hon. Kenesaw M. Landis, District Judge appears the following entry to-wit:

Chicago Great Western Railroad Company,
vs.
Postal Telegraph-Cable Company. } 735

Upon motion of the plaintiff, leave is hereby granted said plaintiff to file amended bill instanter and defendant is hereby ruled to answer the same in twenty days from this date.

5 And on to-wit: the tenth day of November, 1916, came the complainant in said entitled cause, by its solicitors and by leave of Court first had and obtained and filed in the clerk's office of said Court, its certain Amended Bill of Complaint, in words and figures following to-wit:

6 AMENDED BILL OF COMPLAINT.

United States of America
Northern District of Illinois } ss.
Eastern Division.

IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois,
Eastern Division.

Chicago Great Western Railroad Company, a corporation,
Complainant.
vs.
Postal Telegraph-Cable Company, a a corporation,
Defendant. } In Equity. No. 735.

To the Honorable, the Judges of the District Court of the United States, In and For the Northern District of Illinois.

The Chicago Great Western Railroad Company, a corporation, brings this, its Amended Bill of Complaint, against the Postal Telegraph-Cable Company, a corporation, and thereupon shows unto the Court the following:

1. That on December 26, 1888, the Chicago, St. Paul and

Bill of Complaint, Sw. 10.

Kansas City Railway Company was a corporation, organized and existing under and by virtue of the laws of the State of Iowa; that subsequent thereto there was duly and legally organized under the laws of the State of Illinois, the Chicago Great Western Railway Company, which said company succeeded to all the rights and properties of said Chicago, St. Paul and Kansas City Railway Company; that subsequent thereto, to-wit, on August 11, 1909, this complainant was duly and legally organized under and by virtue of the laws of the State of Illinois, and is now a resident, citi-
7 zen and inhabitant thereof, and the successor of all the rights and properties of said Chicago Great Western Railway Company.

2. That the defendant, Postal Telegraph-Cable Company, is a corporation organized and existing under and by virtue of the laws of the State of New York, and is a citizen, resident and inhabitant of said State of New York;

3. That said Chicago, St. Paul and Kansas City Railway Company on December 26, 1888, entered into an agreement with the defendant, Postal Telegraph-Cable Company, a true copy of which is hereto attached, marked Exhibit "A," and made a part hereof, whereby the defendant took charge of the telegraph lines and telegraph property of the Railway Company, with the exclusive right in said defendant to use the right of way of the Railway Company for the construction and maintenance of telegraph lines; the Railway Company further agreed to transport free of charge, under certain restrictions, all employes of the defendant and all materials and supplies for the construction and maintenance of the defendant's telegraph lines. In return for the aforementioned grants and privileges the defendant company agreed to transmit free, but within certain limitations, all business of the Railway Company beyond the railway telegraph line. It was further understood and agreed that the Railway Company was to have the full use of all such wires as were then in operation and the exclusive use of two wires on all extensions of the railway as may thereafter be made.

4. That thereafter on the 5th day of February, 1902, a further agreement was entered into between the Chicago Great Western Railway Company (as the successor of the Chicago, St. Paul and Kansas City Railway Company) and this defendant, Postal Telegraph-Cable Company, a true copy of which is hereto attached, marked Exhibit "B," and made a part hereof, whereby the limitation of ten dollars

($10) per mile beyond the lines of the Railway Company was increased to twelve dollars ($12) per mile.

8 5. That this complainant, Chicago Great Western Railroad Company, is the successor of the Chicago Great Western Railway Company and the Chicago, St. Paul and Kansas City Railway Company, and has assumed all the rights, duties and liabilities arising under the aforementioned agreements, Exhibits "A" and "B"; that this complainant has, ever since it succeeded to the rights and duties and liabilities of its predecessor companies, and now is fully complying with all the covenants of said agreements, Exhibits "A" and "B."

6. That ever since railroad and telegraph companies have operated in this country there has existed between almost every railroad and some telegraph company a contract, all of which contracts are substantially similar to the contract hereinbefore mentioned. That a telegraph service along the line of the complainant is highly desirable, and convenient and necessary to the successful operation of the complainant's railroad; that the complainant could not without such a line safely and satisfactorily perform the duty which it was organized to perform, to-wit, the safe transportation of passengers and merchandise for the public; that, on the other hand, a right of way such as the right of way of a railroad company is highly essential and desirable for a telegraph company, and that the value of the service which the complainant furnishes to the defendant under the contract attached to this amended bill of complaint and marked Exhibit "A" cannot be measured in terms of money; that to change the rate of compensation which the complainant receives from the defendant under the contract aforesaid, substantially destroys and impairs the whole agreement because the compensation which the Telegraph Company is required to pany to the Railroad Company and the services which it is required to furnish may not be calculated in terms of dollars and cents and may not be treated as a special grant

9 or privilege. On the contrary, the complainant avers that the service to be rendered by the Telegraph Company to the complainant is part of the measure of value of the right of way and other cross-considerations rendered by the complainant for the defendant; that the interwoven nature of the contract between the complainant and the defendant, as set forth in said contract, the joint payment and superintendence, the segregation of certain wires for railroad service, the interwoven relationship between the railroad

Bill
mplaint.
Nov. 10,

and commercial service, create a situation that would make it impossible, or, in any event, highly unjust to operate the railroad unless the contract is observed, or unless other telegraph lines are constructed. That any breach on the part of the defendant in failing to observe the obligations and to furnish the service imposed upon it by the terms of the contract can not be measured or accurately determined. That in December, 1906, the Interstate Commerce Commission, construing the Interstate Commerce Act as it then existed, stated its opinion to be that such contracts between railroad and telegraph companies, providing in effect for the use of a railroad's right of way by a telegraph company, and an exchange of services between the two parties, that is, the hauling of freight for the telegraph company by the railroad and the transmission of messages for the railroad by the telegraph company, were lawful contracts, except that such parts of such contracts as stipulated or contemplate that the railroad will furnish free or reduced transportation to the telegraph company in connection with the operation of the telegraph company's lines off the right of way of the railroad company, are unlawful. Thereupon Congress amended the Interstate Commerce Act by inserting in Section 1 of the Act the following provision:

"* * * and provided further that nothing in this Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services."

That at the same session of Congress, Congress also amended Section 1 of the Act to Regulate Commerce by inserting therein the following provision:

"And provided further that this provision shall not be construed to prohibit the privilege of passes or franks or the exchange thereof with each other for the officers, agents, employes and their families, of such telegraph, telephone and cable lines, and the officers, agents, employes and their families, of other common carriers subject to the provisions of this Act."

That by reason of such amendment it became, upon the taking effect of said act as amended, lawful, and still is lawful for railroad and telegraph companies to issue to each other franks and passes by means whereof the officers, agents, and employes of telegraph companies and their families may ride upon the passenger trains of common carriers without paying the published rates for such transportation, and, on the other hand, the officers, agents and employes of common

carriers by railroad engaged in interstate commerce lawfully may send messages, either upon the business of said railroad or their own private business, over the lines of telegraph companies without paying the charges provided for in the published tariffs of said telegraph companies.

That thereafter, on March 28, 1916, the Interstate Commerce Commission ruled that such contracts between railroad and telegraph companies were lawful, but that notwithstanding such amendment the exchange of services must be on the basis of the regular rates. A true copy of said ruling of March 28, 1916, is hereinafter set forth, marked Exhibit "C" and made a part hereof.

11 7. That said defendant acting under the supposition, as complainant is advised and believes, that said ruling of the Interstate Commerce Commission required all telegraph companies to charge for and collect the regular rates and tolls on all messages sent by railroads over the lines of the telegraph companies, brought suit against this complainant. That said suit was instituted in the Municipal Court of the City of New York, Borough of Manhattan, First District, entitled "Postal Telegraph-Cable Company, Plaintiff versus Chicago Great Western Railroad Company, Defendant." The complaint sets out that during the specified month the telegraph company transmitted for the railroad company, or at the request of the railroad company, divers and sundry interstate messages to and from New York City and elsewhere, and that during said month said telegraph company, at the request of the railroad company, rendered services for the railroad company in transmitting interstate telegraph messages to and from New York City and elsewhere, and that said services and the delivery and transmission of said messages are reasonably worth a specified sum, no part of which has been paid. That in said action said telegraph company sought to recover upon a quantum meruit and wholly ignored the aforementioned contracts between it and this complainant. That service of process in said suit was secured upon one of the directors of the complainant company, although this complainant has never been domesticated in the State of New York and has never appointed any Agent in said State of New York to receive service of process. That in view of the nature of the action, together with the contested jurisdiction of the court, this complainant did not enter its general appearance nor submit to the jurisdiction of the court but raised therein solely the question as to whether said complainant was subject to service in the Courts of New

12 York. That as a result thereof judgment was rendered against this complainant on June 28, 1916, for $396.41 damages and costs, from which said judgment an appeal has been prosecuted to the Appellate Term of the Supreme Court of the State of New York, which appeal is now pending.

8. That subsequent thereto four additional suits have been instituted by the defendant herein and against this complainant in the same court for the tolls for the succeeding months. That each of said suits is essentially the same as the first suit above mentioned, except that it seeks to recover for services during different periods of time. That the complainant has, up to the present time, made no contest in any or either of the last mentioned foregoing suits. That this defendant threatens to institute an additional suit each and every month for the tolls for the previous month, and has signified its intention to continue to harass and annoy this complainant by bringing suit each month.

9. This complainant is informed and believes, and charges the fact to be, that the said defendant intends and threatens to bring additional suits each and every month for the tolls for the previous month, and has signified its intention to continue to harass and annoy this complainant by bringing such suits.

10. Forasmuch, Therefore, as your orator is without remedy in the premises, except in a court of equity, your orator prays as follows:

(a) That your Honors may grant unto your orator a writ of subpoena issuing out of and under the seal of this Honorable Court directed to the said Postal Telegraph-Cable Company, which is made a party defendant hereto, commanding it, on a day certain therein to be named, and under certain penalties, to be and appear before this Honorable Court and then and there to answer (but not under oath, answer under oath being hereby expressly waived) the premises, and to stand to and abide by such order, direction and decree

13 as may be made against them or any of them, in the premises and as shall seem to your Honors to be meet and agreeable to equity and good conscience.

(b) That said contracts of December 26, 1888, and February 5, 1902, made by and between said defendant and said predecessor companies of this complainant, the Chicago, St. Paul and Kansas City Railway Company and the Chicago Great Western Railway Company, be by this Honorable Court declared to be valid and subsisting contracts, binding upon said defendant and enforceable against it.

(c) That said suits at law now pending in the Municipal Court of the City of New York, and in the Appellate Division of the Supreme Court of New York between said defendant and this complainant be stayed during the pendency of this proceeding, that said defendants be also restrained and enjoined during the pendency of this proceeding by the order of this Court from bringing further suits against this complainant arising in or from the collection of telegraph tolls, that said defendant be forever enjoined and restrained by the order and decree of this Court from further prosecuting said suits, and also be forever restrained and enjoined from bringing any action of any kind against this complainant arising in or from the collection of telegraph tolls, except such as may arise from or under the said contracts, Exhibits "A" and "B."

(d) That a mandatory injunction may forthwith be entered herein requiring the said defendant to continue to furnish to the complainant, its officers, agents and employes, the telegraphic service provided for in said contracts attached hereto and marked Exhibits "A" and "B."

(e) That your orator may have such other and further relief in the premises as the nature of the case may require and to your Honors shall seem meet.

14 May it please your Honors to grant unto your orator the writ of injunction issued out of and under the seal of this Honorable Court, restraining and enjoining the said defendants, its officers, agents and employes, and all other persons or corporations whomsoever, as hereinabove prayed.

CHICAGO GREAT WESTERN RAILROAD COMPANY,

By SAMUEL M. FELTON,
Its President.

JOHN BARTON PAYNE and
RALPH M. SHAW,
Solicitors for Complainant.

15 State of Illinois, } ss.
County of Cook. }

Samuel M. Felton makes oath and says that he is President of Chicago Great Western Railroad Company, complainant in the foregoing bill; that he has read said bill and knows the contents thereof, and that the allegations therein contained are true of his own knowledge, except as to the matters and things therein stated to be alleged upon information

and belief, and as to those matters he believes it to be true.

SAMUEL M. FELTON.

Subscribed and sworn to before me this 8th day of November, A. D. 1916.

B. M. JENSEN,
Notary Public.

(Seal)

16 EXHIBIT No.

Interstate Commerce Commission

Washington, March 28, 1916.

The Commission approved and adopted the following Conference Ruling:

Upon inquiry as to whether or not under the provision of Section 1, "That nothing in this Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers, for the exchange of services," a railroad may contract with a telegraph company (including in that term "telephone, telegraph and cable companies"), to transport the property of such telegraph company, whether for use on the line of said railroad or merely to be transported over such line for use elsewhere, at a different rate from that applicable to such transportation under Section 6 of the Act, Held, That while said carriers may contract for an exchange of services, such services must be exchanged upon the basis of the lawful rates of said railroad, as published and filed in accordance with the provisions of Section 6 of the Act, and of the reasonable charges of said telegraph company, regularly charged other customers for similar services; except that said carriers may contract, without reference to said lawful rates and charges, for the transportation by said railroad for said telegraph company of the property of the latter over the line of the former when such property is to be used along the line of said railroad and in the construction, improvement, or operation of said railroad, that is to say, when such transportation is not conducted by said railroad as a common carrier.

(Endorsed) Filed Nov. 10, 1916, T. C. MacMillan, Clerk.

17 And afterwards to-wit: on the eighteenth day of November, 1916, came the defendant in said entitled cause by its solicitor and filed in the clerk's office of said court, its certain Answer to the amended bill of complaint. Said Answer is in the words and figures following to-wit:

18 ANSWER TO AMENDED BILL OF COMPLAINT.

IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

Eastern Division.

Chicago Great Western Railroad Company, a corporation, *Complainant,* —*against*— Postal Telegraph-Cable Company, a corporation, *Defendant.*	In Equity No. 735 Answer to Amended Bill of Complaint.

The defendant answering the amended bill of complaint herein alleges as follows:

I: Defendant alleges as a defense and point of law arising upon the face of the bill that there is an insufficiency of fact to constitute a valid cause of action in equity.

II: That defendant denies the allegations in "6" of the complaint that a telegraph right of way on a railroad right of way is highly essential for a telegraph company, and that the value of the service which the complainant renders the defendant under the contract attached to the amended bill of complaint cannot be measured in terms of money, and that to change the rate of compensation which complainant receives from the defendant under said contract substantially destroys and impairs the whole agreement, and that the compensation which the defendant is required by said contract to pay to complainant for services which the defendant is required to furnish thereunder may not be calculated in terms of dollars and cents, and that the service rendered by defend-

ant to complainant under said contract is part of the
19 measure of value of the right of way and other cross-considerations rendered by complainant to defendant, and that the provisions of the contract as specified in the amended bill of complaint create a situation that would make it impossible or highly unjust to operate complainant's railroad unless the contract is observed, or unless other telegraph lines are constructed, and that any breach of contract by defendant in not carrying out its obligations to furnish the service called for by the contract cannot be measured or accurately determined. Further answering the amended

bill of complaint, defendant denies that the Act of Congress of June 18th, 1910, amending Section 1 of the Act to Regulate Commerce rendered lawful, and that it still is lawful for railroad and telegraph companies to issue to each other franks and passes by means whereof the officers, agents and employees of telegraph companies and their families may ride upon the passenger trains of common carriers without paying the published rates for such transportation, and, on the other hand, the officers, agents and employees of common carriers by railroad engaged in interstate commerce lawfully may send messages, either upon the business of said railroad or their own private business, over the lines of telegraph companies without paying the charges provided for in the published tariffs of said telegraph companies.

III: That defendant denies the allegations in "8" and "9" of the amended bill of complaint that the purpose of defendant in instituting suits in New York City against this complainant for telegraph tolls has been or is to harass and annoy the complainant. Defendant alleges that it has repeatedly requested complainant to set up in defense of such suits in New York City the contracts which form the basis of this suit in order that the validity of the order of the Interstate Commerce Commission of March 28th, 1916, referred to in the amended bill of complaint herein might be determined in an orderly way, but that complainant has refused and still refuses to defend against such suits in New York City on that ground, and, on the other hand, refuses to comply with said order of the Interstate Commerce Commission of March 28, 1916. Defendant alleges that it is willing to test the validity of said order of March 28th, 1916, of said Interstate Commerce Commission, in this or any other suit and has endeavored to have such test suit or suits instituted and vigorously prosecuted.

IV: Further answering the amended bill of complaint herein and as a separate defense thereto, defendant alleges that both the complainant and defendant are subject to the Interstate Commerce Act and that the railroads owned or operated by complainant are post-roads within the meaning of S. 3964 of the Revised Statutes of the United States, and that the defendant has duly accepted the Post Road Act of Congress of July 24, 1866, and the Acts amendatory thereof or supplemental thereto, such acceptance having been filed with the Postmaster-General of the United States prior to the commencement of this suit in accordance with the terms of said Act.

That in the year 1914 the telegraphing done by defendant for complainant under the contracts referred to in the amended bill of complaint amounted to Seven thousand
21 nine hundred eighty-five dollars and thirteen cents, ($7,985.13), at regular public telegraph rates, and during said year the railroad transportation of men by complainant for defendant under said contracts amounted to Two thousand eight hundred forty-four dollars and twelve cents ($2,844.12), at regular public rates, and upon information and belief the transportation of material by complainant for defendant in said year amounted to not more than Twelve hundred dollars ($1200.) at regular public rates. That in the year 1915 the telegraphing done by defendant for complainant under the contracts referred to in and amended bill of complaint amounted to nine thousand one hundred dollars and four cents ($9,100.04), at regular public telegraph rates, and during said year the railroad transportation of men by complainant for defendant under said contracts amounted to Two thousand four hundred eight dollars and forty-six cents ($2,480.46) at regular public rates, and upon information and belief the transportation of material by complainant for defendant in said year amounted to not more than twelve hundred dollars ($1200) at regular public rates. That attached hereto and made a part hereof and marked Exhibits 1, 2, 3 and 4, respectively, are the ruling of the Interstate Commerce Commission of December 21, 1906, June 3, 1907, June 30, 1908, and March 28, 1916, the said ruling of March 28, 1916, being the ruling referred to in the amended bill of complaint herein as "Exhibit C" attached to said amended bill. That prior to the 20th day of May, 1909, receivers were appointed by this court of the property and assets of the Chicago Great Western Railroad Company, referred to in the amended bill of complaint herein, that company having become in-
22 solvent, said receivers having been appointed in the suit of John A. Humbird, et al., complainant, against Chicago Great Western Railroad Company, defendant, and on said 20th day of May, 1909, or thereabouts, this defendant presented a petition to this court sitting in Chancery, asking the court to direct said receivers to refund to this defendant Thirty-two dollars ($32) which said receivers had compelled this defendant to pay for the transportation of this defendant's linemen, in connection with certain repair work which said linemen were about to do for this defendant on this defendant's telegraph lines, not on and along the railroads

in charge of said receivers. That thereupon said petition was referred by this Court sitting in Chancery to A. R. Moore, a special Master, to investigate and report, and that on or about March 16th, 1910, said Special Master did report to this Court sitting in Chancery that this defendant was not entitled to any such relief as it sought and prayed for. That thereafter on March 16th, 1910, said Special Master overruled the exceptions by this defendant to the said report, and thereafter on May 4th, 1910, this court by its Circuit Court Judge, the Hon. Christian C. Kohlsaat, entered an order overruling said exceptions and approving said Master's Report and sustaining the demurrer of the Receivers to the petition of this defendant and dismissing the petition at this defendant's cost. This defendant alleges that the contracts involved in said petition by this defendant are the same contracts, copies of which are attached to the amended bill of complaint herein. Defendant further alleges that thereafter and until the passage of the Act of Congress of June 18th, 1910, said Receivers and this complainant as successors, of the railroads, property and rights of said Receivers, refused
23 to comply with said contracts so far as the transportation of the men and materials of this defendant was concerned when for use off from the lines of railroad of this complainant. Defendant further alleges that said decision of this court and said facts are a bar to the suit by equitable estoppel, res judicata and stare decisis and the principles of law pertaining thereto.

V: Further answering the amended bill of complaint herein and as a separate defense thereto, defendant alleges upon information and belief that the rates, fares and charges upon which telegraph men and material of defendant are transported by the complainant, have not been filed and published in accordance with the provisions of the Interstate Commerce Act and particularly of Section 6 thereof. Defendant further alleges that a telegraph line for railroad purposes is necessary to and along every railroad, and if the railroad did not contract with some telegraph company to bear a part of the expense of constructing and maintaining such telegraph line the railroad itself would have to bear the entire expense, including transportation of linemen and telegraph material, without income therefrom to the railroad company. That prior to the making of the contracts referred to in the amended bill of complaint herein, the complainant's predecessor in title had actually constructed and maintained

the telegraph lines involved in said contracts, and said railroad company had to bear the entire expense of construction and maintenance prior to the making of said contracts, including the transportation of linemen and telegraph material without any compensation therefor to the railroad
24 company. Defendant alleges that as to transportation by the complainant of telegraph men and material for use along the line of the railroad of complainant, said rates, fares and charges were not required to be filed.

Wherefore, this defendant demands judgment that the complaint herein be dismissed with costs.

Solicitor for defendant,
111 West Washington St.,
Chicago, Ill.

State of New York, }
County of New York. } ss:

Richard Reynolds, being duly sworn, deposes and says that he is Vice President of the Postal Telegraph-Cable Company, the defendant above named, which company is a corporation created under the laws of the State of New York, and that the foregoing answer to amended bill of complaint is true to the knowledge of deponent, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true. Deponent further says that the reason why this verification is not made by the defendant is that the defendant is such corporation; that this deponent is an officer of the same, to-wit, its Vice President, and is acquainted with the facts.

(Signed) EDWARD REYNOLDS.

Sworn to before me this 1st day of November, 1916.

(Signed) RICHARD T. THOMPSON,
(Seal) *Notary Public, Kings County No.* 22.

Certificate filed in New York County No. 46.

25 EXHIBIT NO. 1.

In The Matter Of Railroad-Telegraph Companies.

Petition of Western Union and Postal Telegraph Companies.
Decided December 21, 1906.

As a telegraph service along its right of way is essential to the safe operation of its trains, a railroad company or a group of separately incorporated roads generally recognized as a "railway system," may lawfully contract to furnish free or reduced-rate transportation to a telegraph company for such of its officers, men, materials, and supplies as are required in connection with the construction, maintenance, and operation of such a telegraph line and service upon its own right of way; and the legality of such free or reduced-rate transportation is not affected by the fact that the telegraph company may also use such telegraph lines in connection with its telegraph service to the public.

But such a railroad company or system of roads can not lawfully contract in consideration of free telegraph service or service at reduced rates over wires beyond its own right of way, to furnish free or reduced-rate transportation for the officials, employees, laborers, materials or supplies of a telegraph company in connection with the construction, maintenance, or operation of a telegraph line and service off the line of such railroad company or system of railroads and upon the line or lines of another carrier or system.

Previous rulings of the Commission in relation to "Payment" for transportation" and "Issuance and use of free passes," so far as they may affect or control railroad-telegraph contracts, explained and reaffirmed.

Report and Opinion of the Commission.

26 By the Commission.

On September 15, 1906 the Commission formally announced in a general tariff circular the following administrative ruling:

Payment for transportation: Nothing but money can be lawfully received or accepted in payment for transportation subject to the act whether for passengers or property, or for any service in connection therewith, it being the opinion of the commission that the prohibition against charging or collecting a greater or less or different compensation than the established rates in effect at the time precludes the acceptance of services, property or other payment, in lieu of the amount of money specified in the published schedules.

On October 12, 1906, the Commission announced an administrative ruling as follows: Exh

Issuance and use of free passes. The provisions of the act relative to the issuance of free tickets, free passes, free transportation, or free carriage to employees of carriers apply only to persons who are actually in the service of the carriers and who devote substantially all their time to the work or business of such carriers. Land and immigration agents, unless they are bona fide and actual employees, representatives of correspondence schools, agents of accident or life insurance companies, agents of oil or lubricating companies, etc. are not within the classes to which free or reduced-rate transportation can be lawfully furnished.

But the Commission does not construe the law as preventing a carrier from giving necessary free transportation to a person traveling over its line solely for the purpose of attending to the business of, or performing the duty imposed upon the carrier, nor from giving free carriage over its line to the household and personal effects of an employee who is required to remove from one place to another at the instance of, or in the interests of, a carrier by which he is employed.

Nor does the Commission construe the law as preventing a carrier from giving free or reduced-rate carriage over its line to contractors for material; supplies, and men for use in construction, improvement, or renewal work on the line of that carrier, provided such arrangements for free or reduced-rate carriage are made a part of the specifications upon which the contract is based and of the contract itself.

In making the above ruling of October 12 the Commission intended to be understood as holding that the provisions of law permitting carriers to accord free or reduced-rate transportation under certain conditions and for certain pur-
27 poses, apply, inter alia, to materials, supplies and men required under contracts between railroads and telegraph companies for the construction, maintenance, and operation of telegraph lines upon and along the rights of way of such railroad companies and for use in connection with the operation of their own lines; and as implying also that, inasmuch as a telegraph service along their own right of way is a necessary part of their equipment and is essential to the safe operation of trains by railroad companies, the legality of such free or reduced-rate transportation so accorded by the carriers to such telegraph companies is not affected by the fact that telegraph companies are frequently permitted by the carriers to use the telegraph lines so erected along their

No. 1. own right of way, in the performance by such companies of a telegraph service for the public.

On November 9 the Commission heard the arguments of counsel for the Western Union and Postal Telegraph Companies in support of their petition, filed with the Commission, for a modification of the above rulings so far as they might control or govern certain contracts theretofore entered into between the petitioning telegraph companies and certain railroad companies, under which, in consideration of the free telegraph service accorded by the petitioners over wires of the lines of the respective contracting railroad companies, the latter agree to furnish free or reduced-rate transportation to such telegraph companies for the men, materials and supplies necessary in connection with the construction, operation and maintenance of such telegraph lines off the lines of the respective contracting carriers, and upon the rights of way of other carriers. Counsel for several railroad companies were also heard in support of the petition of the telegraph companies.

28 After a careful consideration of the oral arguments of counsel and of the printed and typewritten briefs submitted to us in support of these petitions, the Commission is of the opinion that the rulings above set forth are in exact conformity with the terms and spirit of the law. Contracts between telegraph companies and carriers for the maintenance of telegraph lines on the rights of way of railroads are sui generis and unlike any other contracts with carriers that have come to our attention. So far as we can now see, the full performance of such contracts by the carriers with whom they are made would not affect any public or private interests adversely. Nevertheless, the Commission knows of no provision or law now in force that vests it with any authority or any clause in the law that affords it a reasonable ground to differentiate "off the line" service by carriers for telegraph companies from the transportation of merchandise or any other form of property for private shippers. The mere fact that carriers, as a means of securing traffic, make agreements with shippers, tracing the freight cars on the rails of other carriers, communicating with their agents in distant localities, etc., etc., frequently find it convenient to telegraph to points beyond their own right of way and are allowed by the telegraph companies to do so free or at reduced telegraph rates, does not make it lawful for a railroad company to grant to a telegraph company free or reduced-rate carriage for its offi-

cers, men, materials, or supplies destined for use in the tele- Exhi
graph service on the right of way of other carriers.

The Commission is of the opinion that such contracts with telegraph companies may lawfully be entered into by a railroad or a group of separately incorporated roads generally recognized as a "railway system"; and that, in consideration of the construction, maintenance, and operation of a tele-
29 graph line upon the right of way of such road or system of roads, which telegraph line such road or system would otherwise be compelled as an operating necessity to construct and maintain for itself, a carrier may accord to such telegraph company free or reduced-rate transportation for such officers, men, materials and supplies of such telegraph company as are required and necessary in connection with the construction, maintenance and operation of such telegraph lines upon such carrier's own right of way or the right of way of such system of roads.

But the Commission is of the opinion that so much of any such contract between a telegraph company and a carrier as stipulates or contemplates that such carrier will furnish free or reduced-rate carriage and transportation to the officials, employees, laborers, materials, or supplies of such telegraph company, in connection with the construction, maintenance and operation of a telegraph line and service off the lines of such carrier and on the lines or system of lines of any other carrier, and for the use and service of such other carrier or for such telegraph company, is unlawful under the terms of the act to regulate commerce. In our opinion no railroad or system of railroads can lawfully stipulate or contract with a telegraph company for the carriage of its officials, employees, or property for any greater or less or different consideration than that specified in the regularly published tariffs in effect at the time, except in connection with the construction, operation, and maintenance of a telegraph service on its own lines or system of lines.

Except as the rulings of the commission are herein explained and applied, the petition of the telegraph companies is denied.

No. 2. 30 EXHIBIT NO. 2.

Transportation of Men or Property for Telegraph Companies. (issued June 3, 1907). In its decision on the petition of the Western Union and Postal Telegraph Companies, issued December 27, 1906, the Commission held it would be unlawful for a carrier subject to the act to contract or stipulate with a telegraph company for the carriage of its officials, employees or property for any greater or less or different compensation than that specified in the regularly published tariffs in effect at the time, except in connection with the construction, operation, and maintenance of telegraph line and service on its own line. It was held that a group of separately incorporated roads, recognized as a "railway system," may be considered as one in the making of contracts for telegraph service on that system.

This definitely differentiates between the employees of the telegraph company who are actually engaged in constructing and maintaining a telegraph line along the line of a railway, or in operating such telegraph line as a part of the actual operation of that railway, and those who are engaged in the commercial business of the telegraph company. The fact that railway officials may, by the use of D. H. franks, send messages on railway business from or receive such messages at a commercial office of a telegraph company does not constitute that office a part of the operating of any of the lines of railway which such officials represent, nor bring that telegraph office into such relationship with the business of the railways as to warrant treating it as a part of the operating facilities of such railways. Practically all telegraphing so done is "off the line" business and is to be considered as commercial business. The same distinction is to be observed in the hauling of materials and supplies for telegraph companies with which the railway company has contract for telegraphic service.

31 EXHIBIT NO. 3. Exhi

Ruling of Interstate Commerce Commission of June 30th, 1908.

Notice as to the issuance of Passes. It appearing that the ruling issued by the Commission on the 9th day of June, A. D. 1908, relative to the issuance and use of passes, should be modified in certain respects relating to the forms of passes to persons eligible to receive free transportation under the act to regulate commerce, it is ordered that said ruling shall be amended to read as follows:

Many abuses in the issuance and uses of passes have been discovered by the Commission which it is desired to correct, and to this end, and because of the misinterpretation of the law by carriers generally, the Commission at this time makes announcement that it will recommend the indictment and prosecution of all carriers and persons issuing passes to, or allowing the use of passes by, any persons not included within the designated classes to whom free transportation may be given by carriers subject to the act to regulate commerce as set forth in said act. Among those not included under the provisions referred to are the following:

1: Officers or employees of news companies other than newsboys.

2: Officers or employees of telegraph or telephone companies, excepting when personally engaged in operation, extension, repair or inspection of lines upon or along the railroad right of way and used in connection with the operation of the railroad * * *

No. 4. 32

EXHIBIT NO. 4

Interstate Commerce Commission

Washington,

March 28, 1916.

The Commission approved and adopted the following Conference Ruling:

Upon inquiry as to whether or not under the provision of Section 1, "That nothing in this Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers, for the exchange services," a railroad may contract with a telegraph company (including in that term "telephone, telegraph and cable companies"), to transport the property of such telegraph company, whether for use on the line of said railroad or merely to be transported over such line for use elsewhere, at a different rate from that applicable to such transportation under Section 6 of the Act, Held, That while said carriers may contract for an exchange of services, such services must be exchanged upon the basis of the lawful rates of said railroad, as published and filed in accordance with the provisions of Section 6 of the Act, and of the reasonable charges of said telegraph company, regularly charged other customers for similar services; except that said carriers may contract, without reference to said lawful rates and charges, for the transportation by said railroad for said telegraph company of the property of the latter over the line of the former when such property is to be used along the line of said railroad and in the construction, improvement, or operation of said railroad, that is to say, when such transportation is not conducted by said railroad as a common carrier.

(Endorsed) Filed Nov. 18, 1916, T. C. MacMillan, Clerk.

33 And afterwards, to-wit: on the eleventh day of January, 1917, came the complainant in said entitled cause by its solicitors, and by leave of court first had and obtained, filed in the clerk's office of said Court, its certain Amendment to its Amended Bill of Complaint in words and figures following to-wit:

34 AMENDMENT TO AMENDED BILL OF COMPLAINT.

IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois

Eastern Division.

Chicago Great Western Railroad Company, a corporation, *Complainant,* *vs.* The Postal Telegraph-Cable Company, a corporation, *Defendant.*	In Equity No. 735.

To the Honorable, the Judges of the District Court of the United States, in and for the Northern District of Illinois.

Chicago Great Western Railroad Company, a corporation, by leave of Court first had and obtained, files this, its amendment to its Amended Bill of Complaint heretofore filed herein against The Postal Telegraph-Cable Company, a corporation, by amending Paragraph 5 of said Amended Bill of Complaint to read as follows:

5. That this Complainant, Chicago Great Western Railroad Company, is the successor of Chicago Great Western Railway Company, and the Chicago, St. Paul and Kansas City Railway Company, and has assumed all of the rights, duties, and liabilities arising under the aforementioned agreements, Exhibits A and B; that this Complainant has, ever since it succeeded to the rights, duties, and liabilities of its predecessor companies, been and now is fully complying with all the covenants of said agreements, exhibits A and B; and that this Complainant has at all times fully and faithfully observed, kept, performed all the obligations and requirements under said contracts on its part to be observed, kept and performed, and has faithfully carried out all the provisions thereof and has expended large sums of money
35 in furnishing facilities to the defendant and has permitted the defendant to make use of and enjoy for its poles and lines the right-of-way of this Complainant which is of a value of many thousands of dollars, and the defendant has at all times availed itself of the facilities thus afforded

by this Complainant without complaint on its part that this Complainant was in any respect delinquent in failing to render to the defendant all of the services and benefits it was entitled to receive and enjoy under each and every of the provisions of said contracts; and this Complainant now stands ready and is able and willing and hereby tenders performance and continued performance to the Defendant of each and every of the provisions thereof and of all the conditions and obligations imposed upon this Complainant thereby, and alleges that upon such performance on its part it is entitled to require from the Defendant the performance of all the provisions of said contracts thereby required to be performed on the part of the Defendant.

CHICAGO GREAT WESTERN RAILROAD COMPANY,
By

(Signed) S. M. FELTON
Its President.

(Signed) JOHN BARTON PAYNE and RALPH M. SHAW
Solicitors for Complainant.

State of Illinois }
County of Cook. } ss

Samuel M. Felton, makes oath and says that he is the President of the Chicago Great Western Railroad Company, complainant herein; that he had read the foregoing amendment to the Amended Bill of Complaint heretofore filed herein and that the allegations therein contained are true of his own knowledge except as to the matters and things therein alleged to be on information and belief and as to those matters he believes it to be true.

(Signed) SAMUEL M. FELTON

Subscribed and Sworn to before me this 30th day of December, A. D. 1916.

(Signed) B. M. JENSEN
(Seal) *Notary Public.*

(Endorsed) Filed Jan. 11, 1917, T. C. MacMillan, Clerk.

36 And on to-wit: the eleventh day of January, 1917, in the record of proceedings in said entitled cause before the Hon. Kenesaw M. Landis, District Judge, appears the following entry to-wit:

Chicago Great Western Railroad Company, a corporation,
vs.
Postal Telegraph-Cable Company, a corporation.
735.

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It is hereby ordered, adjudged and decreed that leave be granted to the complainant herein to file instanter its amendment to the amended bill of complaint heretofore filed and that the answer of the defendant heretofore filed to the amended bill of complaint stand as the answer to the amendment to the amended bill of complaint.

37 And afterwards to-wit: on the twelfth day of January, 1917, came the complainant in said entitled cause by its solicitors and filed in the clerk's office of said Court its certain Reply to the Answer of the defendant to the Amended Bill of Complaint. Said Reply is in words and figures following to-wit:

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38 REPLY OF THE COMPLAINANT TO THE ANSWER OF THE DEFENDANT TO THE AMENDED BILL OF COMPLAINT.

IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois

Eastern Division

Chicago Great Western Railroad Company,
vs.
Postal Telegraph-Cable Company.
In Equity No. 735.

Reply of the Complainant to the Answer of the Defendant to the Amended Bill of Complaint.

Now comes the complainant by its solicitors, and for reply to the matters and things set forth in the "Answer of the Defendant to the Amended Bill of Complaint" says:

1. That it denies the averments in Paragraph 1 of said Answer.

2. The complainant denies the statements set forth in

Paragraph 3 of the defendant's answer, alleging that defendant repeatedly requested complainant to set up in defense of the suits in New York City the contracts which form the basis of this suit, but complainant admits that it refused to set up as an affirmative defense said contracts. The complainant further admits that it has refused to plead to the merits in sundry actions against it by the defendant in the courts of the State of New York. The complainant asserts that it is not subject to the service of process in the courts of the State of New York or to the jurisdiction thereof.

3. The complainant admits that both it and the defendant are subject to the jurisdiction of the Interstate Commerce Act. The complainant avers that as to whether or not the defendant is a post road and as to whether or not it has duly accepted the Post Road Act of Congress the complainant is not advised, but the complainant demands strict proof thereof if it becomes material on the hearing of this cause. The complainant denies that the figures set forth in Paragraph 4 of the defendant's answer as representing the aggregate amounts of the telegraphic service furnished by the defendant to the complainant in the years 1914 and 1915,
39 measured at the regular tariff rates of the defendant, are correct; and denies that the figures set forth in Paragraph 4 of the defendant's answer as representing the aggregate amounts of the transportation service furnished by the complainant to the defendant in the years 1914 and 1915, measured at the regular tariff rates of the complainant, are correct. The complainant avers that even if said statements be true they are immaterial and irrelevant to the controversy presented in this proceeding.

The complainant admits that the rulings of the Interstate Commerce Commission attached to the said defendant's answer and referred to in Paragraph 4 were made at the time or times they are said to have been made by the Interstate Commerce Commission; and the complainant avers that many other rulings touching upon the same subject have been made by the Interstate Commerce Commission upon this subject matter, to all of which the complainant refers and begs leave to present in evidence if upon the hearing of this case they should be material thereto.

The complainant denies the averments in said answer touching the appointment of a receiver or receivers for the complainant, and complainant asserts that no receiver was

ever appointed or was ever in possession of the property of this complainant.

Further answering this complainant avers that after the passage of the Act of Congress of June 18, 1910, amending the Interstate Commerce Act and up to and including the date of the institution of the first of the suits referred to in the bill of complaint heretofore filed herein by the complainant, both the complainant and defendant have conducted their business relations each with the other pursuant to and in conformity with the contract set up in said bill of complaint between said complainant and the defendant; and have in all respects ratified and adopted the same.

40 4. Further answering this complainant avers that under the contract between it and the defendant, it is unnecessary for this complainant to file any tariffs and schedules with respect to the transportation of the property which it is required under the contract aforesaid to transport for the defendant.

Further answering this complainant denies that it has failed to file its tariffs with respect to the transportation of property of telegraph companies other than the defendant over the lines of the complainant.

Further responding this complainant prays the same advantage of this, its reply, as if it had moved to strike out each and every of the averments containing new matter contained in the said defendant's answer.

Wherefore the complainant says that it is entitled to receive and prays that it may receive the relief asked for in its amended bill of complaint.

(Signed) JOHN BARTON PAYNE
(Signed) RALPH M. SHAW
Solicitors for complainant.
Chicago Great Western Railroad Co.

(Endorsed) Filed Jan., 12, 1917, T. C. MacMillan, Clerk.

41 And on to-wit: the ninth day of February, 1917, in the record of proceedings in said entitled cause before the Hon. A. B. Anderson, District Judge, appears the following entry to-wit:

1917. Chicago Great Western Railway Company
vs.
Postal Telegraph-Cable Company. } 735.

Upon motion of the respective parties hereto, it is ordered by the court that the above entitled cause be and the same is reset for hearing on February 27, before Judge Evans.

1917. 42 And on to-wit: the twenty-fourth day of May, 1917, in the record of proceedings in said entitled cause, before the Hon. Evan A. Evans, Circuit Judge, appears the following entry to-wit:

Chicago Great Western Railroad Company,
vs.
Postal Telegraph-Cable Company. } 735.

Now come the parties by their respective solicitors and now this cause comes on for trial. Thereupon evidence on behalf of the respective parties is heard and concluded. Upon motion, leave is hereby granted the defendant to amend on its face its answer to amended bill by changing name of the Chicago Great Western Railroad Company, to Chicago Great Western Railway Company in lines twenty-one and thirty on page four.

It is ordered by the Court that plaintiff file its brief in fifteen days, the defendant have ten days thereafter and plaintiff to have ten days in which to file reply brief.

67 And on to-wit: the twelfth day of October, 1917, there was filed in the clerk's office of said court in said entitled cause, a certain Certificate of Evidence, in words and figures following to-wit:

CERTIFICATE OF EVIDENCE.

United States of America,
Northern District of Illinois, } ss.
Eastern Division.

IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois,
Eastern Division.

Chicago Great Western Railroad Company, a corporation,
Complainant.
vs.
Postal Telegraph Cable Company, a corporation,
Defendant.
} In Equity, No. 735.

Certificate of Evidence.

Be It Remembered that heretofore, to-wit, on the 17th day of May, A. D. 1917, this cause came on for hearing before the Honorable Evan A. Evans, sitting as a District Judge, on the Equity side thereof, upon the pleadings heretofore filed herein.

Present:
Messrs. Winston, Payne, Strawn & Shaw, by Mr. George A. Kelly, appearing for complainant.
Mr. Jacob E. Dittus, appearing for defendant.

68 Whereupon the complainant to maintain the issues upon its part, introduced the following evidence, to-wit:

Mr. Kelly: Now Mr. Dittus.

(Mr. Kelly and Mr. Dittus conferred together out of the hearing of the reporter.)

Mr. Kelly: I have here, if the court please, certified copies of the various suits which were instituted by the defendant against the complainant in New York, but in view of the turn which has now been taken in this litigation, Mr. Dittus does not believe, and I do not believe it is necessary to offer those in evidence, as that question is out of the case at this time.

The Court: Take this down, Mr. Reporter.

In view of the fact that there is no conflict in reference to the threatened litigation, or necessary facts to give the court of equity jurisdiction, I will not require the complainant to introduce proof which would be necessary to maintain its

of filed 1917. case in order to grant an injunction, but I will assume that the case is to be determined upon the rights under the contracts, if any there are.

69 Mr. Kelly: Yes.

Mr. Dittus: Yes.

The Court: That will save the taking of certain testimony

Mr. Kelly: Yes.

The Court: And, Mr. Reporter, take this further: The defendant does not insist upon any testimony upon that issue.

Mr. Kelly: I also desire, if the court please, to offer in evidence at this time, certain Conference Rulings of the Interstate Commerce Commission, certain excerpts from the 21st and 22nd annual reports of the Interstate Commerce Commission to Congress, all bearing on the question at issue in this case. I have furnished Mr. Dittus with a memorandum of these Conference Rulings, and I understand that there is no objection to their being received in evidence.

Mr. Dittus: With the understanding—

The Court: Just mark them, have the reporter mark them Exhibit No. 1. (Papers so marked by the reporter.)

Mr. Dittus: With the understanding that I have the same right to introduce any other Conference Rulings I may think material, I will have no objection.

Mr. Kelly: Yes.

The Court: It will be received with that understanding.

(Said Conference Rulings being marked Complainant's Exhibit 1, so offered and received in evidence, as aforesaid, and the same is in the words and figures following, to-wit.)

70 CONFERENCE RULING 27—SEPTEMBER 15, 1906.

207. Payment for Transportation.—Nothing but money can be lawfully received or accepted in payment for transportation subject to the act, whether of passengers or property, or for any service in connection therewith, it being the opinion of the Commission that the prohibition against charging or collecting a greater or less or different compensation than the established rates or fares in effect at the time, precludes the acceptance of services, property, or other payment in lieu of the amount of money specified in the published schedules.

CONFERENCE RULING NO. 208, OCTOBER 12, 1906. (Paragraph c)

208. Free Passes and Free Transportation. * * *

(c) Nor does the Commission construe the law as preventing a carrier from giving free or reduced-rate carriage over its line to contractors for material, supplies, and men for use in construction, improvement, or renewal work on the line of that carrier, provided such arrangements for free or reduced-rate carriage are made a part of the specifications upon which the contract is based and of the contract itself.

CONFERENCE RULING 219. JUNE 3, 1907.

219. Transportation of Men or Property for Telegraph Companies.—(a) In its decision on the petition of the Western Union and Postal Telegraph companies, issued December 27, 1906, the Commission held it would be unlawful for a carrier subject to the act to contract or stipulate with a telegraph company for the carriage of its officials, employees, or property for any greater or less or different compensation than that specified in the regularly published tariffs in effect at the time, except in connection with the construction, operation, and maintenance of telegraph line and service on its own line. It was held that a group of separately incorporated roads, recognized as a "railway system," may be considered as one in the making of contracts for telegraph service on that system. (See Rulings 95-a, par. 2, and 161; see also amendatory act of June 18, 1910, interpreted in Ruling 305).

(b) This definitely differentiates between the employes of the telegraph company who are actually engaged in constructing and maintaining a telegraph line along the line of a railroad, or in operating such telegraph line as a part of the actual operation of that railway, and those who are engaged in the commercial business of the telegraph company. The fact that railway officials may, by use of deadhead franks, send messages on railway business from or receive such messages at a commercial office of a telegraph company does not constitute that office a part of the operation of any lines of railway which such officials represent nor bring that telegraph office into such relationship with the business of the railways as to warrant treating it as part of the operating facilities of such railways. Practically all

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telegraphing so done is "off the line" business and is to be considered as commercial business. The same distinction is to be observed in the hauling of materials and supplies for telegraph companies with which the railway company has contract for telegraphic service.

Paragraph (c) of Conference Ruling 219—Nov. 15, 1907.

(c) This rule applies also to telephone service, and carriers that have not already done so are hereby requested and called upon to promptly file with the Commission copies of all contracts for telegraph or telephone service on their lines. (See Ruling 305).

CONFERENCE RULING 305—MARCH 31, 1911.

305. Application of the Amended Act to Telegraph and Telephone Companies. * * *

(d) It follows that telegraph and telephone companies subject to the act, as above indicated, must conform to the provisions of section 1 thereof requiring that all of their rates and charges for the transmission of interstate messages shall be reasonable and just, and that such companies may lawfully issue franks covering free interstate service or may grant free interstate service to the same extent, and subject to the same limitations as other common carriers under the provisions of said section.

CONFERENCE RULING 364—JUNE 8, 1912.

364. Exchange of Services by Telegraph and Railroad Companies. Under the amendatory act of June 18, 1910, it is provided "That nothing in this act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers for the exchange of services." Upon inquiry, Held, That a railroad company and a telegraph company may exchange services with respect to strictly company matters on the basis of their agreement.

72 RULING OF THE COMMISSION DECEMBER, 1906, "IN THE MATTER OF RAILROAD TELEGRAPH COMPANIES" (INTERSTATE COMMERCE REPORTS, VOL. 12, P. 12).

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"Contracts between telegraph companies and carriers for the maintenance of telegraph lines on the rights of way of railroads are sui generis and unlike any other contracts with carriers that have come to our attention. So far as we can now see, the full performance of such contracts by the carriers with whom they are made would not affect any public or private interest adversely. Nevertheless, the Commission knows of no provision of law now in force that vests it with any authority, or any clause in the law that affords it a reasonable ground, to differentiate 'off the line' service by carriers for telegraph companies from the transportation of merchandise or any other form of property for private shippers. The mere fact that carriers, as a means of securing traffic, making agreements with shippers, tracing their freight cars on the rails of other carriers, communicating with their agents in distant localities, etc., etc., frequently find it convenient to telegraph to points beyond their own right of way and are allowed by the telegraph companies to do so free or at reduced telegraph rates does not make it lawful for a railroad company to grant to a telegraph company free or reduced-rate carriage for its officers, men, materials, or supplies destined for use in a telegraph service on the right of way of other carriers.

The Commission is of the opinion that such contracts with telegraph companies may lawfully be entered into by a railroad or by a group of separately incorporated roads generally recognized as a 'railway system'; and that, in consideration of the construction, maintenance and operation of a telegraph line upon the right of way of such road or system of roads, which telegraph line such road or system would otherwise be compelled as an operating necessity to construct and maintain for itself, a carrier may accord to such telegraph company free or reduced rate transportation for such officers, men, materials and supplies of such telegraph company as are required and necessary in connection with the construction, maintenance, and operation of such telegraph lines upon such carrier's own right of way or the right of way of such system of roads.

But the Commission is of the opinion that so much of any such contract between a telegraph company and a carrier as stipulates or contemplates such carrier will furnish free or reduced-rate carriage and transportation to the officials, employees, laborers, materials, or supplies of such telegraph company, in connection with the construction, maintenance, and operation of a telegraph line and service off the lines of such carrier and on the lines or system of lines of any other carrier and for the use and service of such other carrier or for such telegraph company, is unlawful under the terms of the act to regulate commerce. In our opinion no railroad or system of railroads can lawfully stipulate or contract with a telegraph company for the carriage of its officials, employees or property for any greater or less or different consideration than that specified in the regularly published tariffs in effect at the time except in connection with the construction, operation, and maintenance of a telegraph service on its own lines or system of lines." (Interstate Commerce Reports, Vol. XII, pp. 12-13.) (Italics ours.)

73 21ST ANNUAL REPORT INTERSTATE COMMERCE COMMISSION.

(p. 25)

"On November 9, 1906, the Commission heard arguments of counsel for the Western Union and Postal Telegraph companies in support of their petition for a modification of the rulings of the Commission in regard to payment for transportation and issuance and use of free passes so far as they might control or govern certain contracts theretofore entered into between the petitioning telegraph companies and certain railroad companies, under which, and in consideration of the free telegraph service accorded by the petitioners over wires off the lines of the respective contracting railroad companies, the latter agreed to furnish free or reduced-rate transportation to such telegraph companies for the men, material, and supplies necessary in connection with the construction, operation, and maintenance of such telegraph lines off the lines of the respective contracting carriers and upon the rights of way of other carriers. Counsel for several railroad companies were also heard in support of the petition of the telegraph companies.

"Contracts between telegraph companies and carriers for the maintenance of telegraph lines on the rights of way of

railroads are sui generis and unlike any other contracts with carriers that have come to its attention. So far as the Commission could see, the full performance of such contracts by the carriers with whom they are made would not affect any public or private interest adversely. Nevertheless, the Commission knows of no provision of law now in force that vests it with any authority, or any clause in the law that affords it a reasonable ground, to differentiate "off the line" service by carriers for telegraph companies from the transportation of merchandise or any other form of property for private shippers. The mere fact that carriers, as a means of securing traffic, making arrangements with shippers, tracing their freight cars on the rails of other carriers, communicating with their agents in distant localities, frequently find it convenient to telegraph beyond their own right of way and are allowed by telegraph companies to do so free or at reduced telegraph rates, does not make it lawful for a railroad company to grant to a telegraph company free or reduced-rate carriage for its officers, men, materials, or supplies destined for use in a telegraph service on the right of way of other carriers.

"The Commission held that such contracts with telegraph companies may lawfully be entered into by a railroad or by a group of separately incorporated roads generally recognized as a 'Railway system;' and that, in consideration of the construction, maintenance, and operation of a telegraph line upon the right of way of such road or system of roads, which telegraph line such road or system would otherwise be compelled as an operating necessity to construct and maintain for itself, a carrier may accord to such telegraph company free or reduced rate transportation for such officers, men, materials, and supplies of such telegraph companies as are required and necessary in connection with the construction, maintenance, and operation of such telegraph lines upon such carrier's own right of way or the right of way of such system of roads.

74 "But the Commission also held that so much of any such contract between a telegraph company and a carrier as stipulates or contemplates that such carrier will furnish free or reduced rate carriage and transportation to officials, employees, laborers, materials, or supplies of such telegraph company, in connection with the construction, maintenance, and operation of a telegraph line and service off the lines of such carrier and on the line or system of lines of any other

carrier, and for the use and service of such other carrier or for such telegraph company, is unlawful under the terms of the act to regulate commerce. In its opinion no railroad or system of railroads can lawfully stipulate or contract with a telegraph company for the carriage of its officials, employees, or property for any greater or less or different consideration than that specified in the regularly published tariffs in effect at the time, except in connection with the construction, operation, and maintenance of a telegraph service on its own lines or system of lines."

75 22D ANNUAL REPORT OF INTERSTATE COMMERCE COMMISSION 1908. (PAGE 129)

Points decided in formal proceedings since the Hepburn Act.

"In the matter of railroad-telegraph contracts. (12 I. C. C. Rep. 10)

1. As a telegraph service along its right of way is essential to the safe operation of its trains, a railroad company or a group of separately incorporated roads generally recognized as a 'railway system,' may lawfully contract to furnish free or reduced rate transportation to a telegraph company for such of its officers, men, materials and supplies as are required in connection with the construction, maintenance, and operation of such a telegraph line and service upon its own right of way; and the legality of such free or reduced rate transportation is not affected by the fact that the telegraph company may also use such telegraph line in connection with its telegraph service to the public.

2. But such a railroad company or system of roads cannot lawfully contract, in consideration of free telegraph service or service at reduced rates over wires beyond its own right of way, to furnish free or reduced rate transportation for the officials, employees, laborers, materials, or supplies of a telegraph company in connection with the construction, maintenance, or operation of a telegraph line and service off the line of such railroad company or system of railroads, and upon the line or lines of another carrier or system.

3. Previous rulings of the Commission in relation to 'Payment for transportation' and 'Issuance and use of free passes,' so far as they may affect or control railroad-telegraph contracts, explained and reaffirmed."

76 CONFERENCE RULING OF JULY 15, 1914, PROMULGATED MARCH 28, 1916.

Upon inquiry as to whether or not under the provision of Section 1, "That nothing in this Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers, for the exchange of services," a railroad may contract with a telegraph company (including in that term "telephone, telegraph and cable companies"), to transport the property of such telegraph company, whether for use on the line of said railroad or merely to be transported over such line for use elsewhere, at a different rate from that applicable to such transportation under Section 6 of the Act, Held, That while said carriers may contract for an exchange of services, such services must be exchanged upon the basis of the lawful rates of said railroad, as published and filed in accordance with the provisions of Section 6 of the Act, and of the reasonable charges of said telegraph company, regularly charged other customers for similar services; except that said carriers may contract, without reference to said lawful rates and charges for the transportation by said railroad for said telegraph company of the property of the latter over the line of the former when such property is to be used along the line of said railroad and in the construction, improvement, or operation of said railroad, that is to say, when such transportation is not conducted by said railroad as a common carrier.

77 Mr. Kelly: I endeavored to cull out all Conference Rulings of the Commission bearing on this question, on both sides of it, that has been my endeavor in getting up that memorandum. If there is any I have not included, I am perfectly willing to have them offered.

Now, I think that is all I wish to offer on behalf of the complainant at this time. I do not think that it is necessary to offer any proof as to the allegation about our right-of-way being highly essential and desirable to a Telegraph Company. I will close at this point. I will have some evidence in rebuttal on the question of res adjudicata, probably.

The Court: Let the record show the complainant rests.

Whereupon the complainant rested its case.

And thereupon the defendant to maintain the issues on its part, offered the following evidence, to-wit:

Mr. Dittus: Now, if the court please, on behalf of the defendant, I desire to offer the certificate of the Post Master

General, certifying that the defendant, Postal Telegraph Cable Company, has accepted all the restrictions and obligations required by law.

The Court: Please have it marked by the reporter so
78 we will know what we are referring to.

Mr. Dittus: Yes, please mark it Defendant's Exhibit 1.

(Said document was thereupon marked by the reporter as "Defendant's Exhibit 1.")

The Court: Is there any objection to the offer of "Defendant's Exhibit 1."?

Mr. Kelly: Yes. I desire to interpose an objection, on the ground that it is incompetent, irrelevant and immaterial, if the court please.

The Court: The objection will be overruled. The exhibit, Defendant's Exhibit Number 1 is received in evidence.

(Whereupon said certificate, last above referred to, was marked by the reporter as "Defendant's Exhibit No. 1" and being offered and received in evidence over the objection of the complainant, and the same is in the words and figures following, to-wit:

79 DEFT'S EXHIBIT I.

Post Office Department.

Washington, D. C. May 5, 1897.

I, Jas. A. Gary, Postmaster General of the United States of America, certify that the annexed is a true copy of the original acceptance on file in this Department.

In Testimony Whereof, I have hereto set my hand, and caused the seal of the Post Office Department to be affixed, at the City of Washington, the day and year above written.

JAS. A. GARY,
Postmaster General.
B. W. T.

80 This Is To Certify that the Postal Telegraph-Cable Company, a corporation duly organized under the laws of the State of New York, for the purpose of constructing, maintaining and operating lines of telegraph throughout the United States, has, by resolution duly adopted and entered upon its minutes, accepted and hereby does accept, pursuant to the requirements of Section 5,268 of the Revised Statutes of the United States, all the restrictions and obligations re-

quired by law, and that said Postal Telegraph-Cable Company has in like manner duly authorized the filing with the Postmaster General of the United States of this, its acceptance of such restrictions and obligations. Defe Ex

In Witness Whereof, the said Postal Telegraph-Cable Company has caused this instrument to be sealed with its corporate seal and signed by the President and attested by its Secretary at the City of New York, this seventeenth day of March, eighteen hundred and eighty-six

POSTAL TELEGRAPH-CABLE COMPANY,
by JAMES H. WITHINGTON,
President.

(Postal Telegraph-Cable Co.)
(Incorporated)
(1886.)

Attest:
J. O. STEVENS,
Secretary.

81 Mr. Dittus: I also offer in evidence a transcript of the record, in the case of John A. Humbird, et al. vs. Chicago Great Western Railroad Company, No. 28934, in the Circuit Court of the United States, relating to the intervening petition of the Postal Telegraph Cable Company, in that suit.

The Court: Mark it Defendant's Exhibit No. 2.

(Said document was thereupon marked by the reporter, Defendant's Exhibit No. 2.)

Mr. Dittus: I understand that counsel agrees that this is a correct copy of the record, and may be introduced in lieu of the original record.

Mr. Kelly: Yes.

The Court: Any objections?

Mr. Kelly: Yes, we object, on the ground that that is immaterial, irrelevant and incompetent.

The Court: Defendant's Exhibit No. 2 is received in evidence.

(Which said transcript of record, last above referred to, marked by the reporter "Defendant's Exhibit No. 2," being so offered and received in evidence over the objection of the complainant, and the same is in the words and figures following to-wit:

82 John A. Humbird, *et al.*
vs.
Chicago Great Western Railway Company } 28934.

Pleas in the Circuit Court of the United States Northern District of Illinois, Eastern Division, in Chancery sitting, at the United States Court room, in the City of Chicago, in said District and Division, before the Hon. Christian C. Kohlsaat, Circuit Judge of the United States for the Seventh Judicial Circuit, on Wednesday, the fourth day of May, 1910, being one of the days of the December Term of said Court, begun Monday, the twentieth day thereof, in the year of our Lord one thousand nine hundred and nine, and of the Independence of the United States of America, the one hundred and thirty-fourth year.

Present:

Hon. Christian C. Kohlsaat, Circuit Judge, Presiding.
Luman T. Hoy, United States Marshal for said District and
H. S. Stoddard, Clerk of said Court.

83 In the Circuit Court of the United States

Northern District of Illinois,

Eastern Division.

John A. Humbird, George T. Meyer, Walter Cunliffe Alexander F. Wallace, Edwin Waterhouse and Edward P. Tennant,
vs.
Chicago Great Western Railway Company. } 28934.

Be It Remembered That heretofore, to-wit, on the twenty-third day of January, 1908, in the record of proceedings thereof in the above entitled cause, appears before the Honorable Christian C. Kohlsaat, Circuit Judge, the following entry to-wit:

Def. E

John A. Humbird, George T. Meyer, Walter Cunliffe, Alexander F. Wallace, Edwin Waterhouse and Edward P. Tennant,
vs.
Chicago Great Western Railway Company.

Ordered, That Albert R. Moore, of St. Paul, Minnesota, be and he is hereby appointed Special Master in Chancery, in this cause, to whom shall be referred, as of course, all matters arising in the progress of this cause, which by the rules and practice of this Court, or by the general or special orders of the Court, are required or proper to be referred to a
84 Master in Chancery; said Albert R. Moore, being the Special Master heretofore appointed in that certain cause pending in the Circuit Court of the United States for the district of Minnesota, the court of primary jurisdiction in said cause, wherein John A. Humbird, et al., are plaintiffs, and Chicago Great Western Railway Company is defendant, and in which said cause Alpheus B. Stickney and Chas. H. F. Smith, the receivers herein, were originally appointed receivers.

The Special Master is hereby authorized to establish and maintain his office at the city of St. Paul, in the state of Minnesota, the headquarters of the said receivers appointed in this cause, their principal accounting and operating offices as such receivers being situated at said city of St. Paul, in the state aforesaid, and may, in his discretion, hold a Master's Court at any point in this district he may designate, whenever he is satisfied that costs and expenses may be saved to the estate, or the convenience of the parties promoted by so doing, and shall hold court in this district whenever any witnesses residing in this district are to be examined & so desire.

Whenever the receivers in this cause shall file their reports in the office of the Master in this cause such Master, with the assistance of one or more competent accountants, whom he is authorized to select and employ, will proceed to examine said reports. For the purpose of making said examination the Master, when he deems it necessary may summon the receivers and any of their employes, and any other persons before

him, and examine them under oath touching any and all matters involved in said reports.

85 The Master, by himself and his accountants, is authorized to visit the office or offices of said receivers and their accounting offices, wherever kept, and as often as necessary, to examine all books, vouchers, papers and correspondence within his opinion may be necessary for a full and accurate understanding of the reports of said receivers, and said Master is authorized to demand from said receivers and their clerks, agents and accountants copies of all vouchers, papers and books which he may deem necessary to a full and complete examination of the reports of said receivers.

The Master will proceed with all convenient dispatch in the examination of said reports, and as soon as his examination of any report is completed, will prepare and file his report thereon, together with the report of the receivers, in the office of the clerk of this court.

The receivers shall make and file their reports in the Special Master's office at St. Paul, Minnesota, and shall include therein all matters of administration in the jurisdiction of other Courts.

And afterwards, to-wit, on the twentieth day of May, 1909, came the Postal Telegraph-Cable Company, by its solicitors and filed in the clerk's office of said court in said entitled cause, its certain Intervening Petition in words and figures following, to-wit:

86 United States of America,
Norther District of Illinois, } ss
Eastern Division.

Defe
Ex

IN THE CIRCUIT COURT OF THE UNITED STATES

Northern District of Illinois,

Eastern Division.

John A. Humbird, *et al.*,
Complainants,
vs.
Chicago Great Western Railway Company,
Defendant.
} In Equity.

To the Honorable Christian C. Kohlsaat, Judge of said Court, In Chancery Sitting:

Your petitioner, Postal Telegraph-Cable Company, a corporation organized under the laws of the State of New York, complains of Charles H. F. Smith and Horace G. Burt, Receivers, of the Chicago Great Western Railway Company, and alleges as follows:

1. That your petitioner, the Postal Telegraph-Cable Company, is a corporation organized under the laws of the State of New York, having power and authority under its articles of incorporation to own, construct, use and maintain lines of electric telegraph within and also beyond the limits of the State of New York, and that the lines of telegraph owned and controlled and maintained by your petitioner extend into and through the several states of the Union and connect with ocean telegraph cables at the Atlantic and Pacific seaboards.

2. That the Chicago Great Western Railway Com-
87 pany is a corporation of the States of Illinois, Iowa and Minnesota, and that it is the successor in law to the Chicago, St. Paul and Kansas City Railway Company, a corporation of the State of Iowa, and lessee of the Mason City and Fort Dodge Railway Company, also a corporation of the State of Iowa.

3. That on the 21st day of December, 1888, an agreement was entered into by and between the Chicago, St. Paul and Kansas City Railway Company and your petitioner, a copy of which agreement is hereto attached as Exhibit "A" and

made a part of this petition to the same extent as though it had here been inserted in full.

4. That said contract recites that said railway Company owns and operates a railway extending from the City of Chicago to Minneapolis, via Dubuque, Oelwein and St. Paul, and from Oelwein, via Marshalltown and Desmoines, Iowa, to St. Joseph, Missouri, with various branches as in said agreement set forth, and that said Railway Company owns and operates a line of telegraph consisting of poles and two wires covering nearly the whole of the said route, and that the said Telegraph Company owns and operates lines of telegraph reaching all cities of the United States north of and including St. Louis, Cincinnati, Washington City, and east of the Missouri River and, by its connections the principal cities and towns in British America and on the Pacific Coast, and, via the Commercial Cable Company all points in the Old World, and was engaged in extending its lines into the southern states.

5. That said agreement further recites that the Telegraph Company should take charge of the telegraph lines and property of the Railway Company on the 1st day of January, 1889, and it grants and assures the Telegraph Company the exclusive right of way on and along the line, lands and
88 branches of said Railway Company and on any extensions and branches thereof, for the construction and use of lines of poles and wires, with the right to put up and construct from time to time such additional wires or such additional lines of poles as the Telegraph Company may find necessary for its business. The Railway Company further agrees to furnish all labor necessary for the maintenance, repairs and renewals of said telegraph lines and for any extensions thereto that may hereafter be made upon the property that was then or might hereafter be owned or controlled by the Railway Company and to furnish office rooms in its railway stations.

6. That it was further provided under Section three (3) of said agreement that the Railway Company should transport, free of charge over its railway, on the application of the Superintendent or other officer of the Telegraph Company, employees of the Telegraph Company, when traveling upon the business of said company, and also to transport and distribute free of charge along the line of its railway, all poles and other material or supplies for the construction, maintenance, renewal, repair and operation of the lines and wires covered by said agreement, and of such additional lines of poles and wires as might be erected under the provisions

of said agreement, and also of material and supplies for the establishment, maintenance and operation of the offices of both parties to said agreement at places along and adjacent to said railway. Defendant's Exhibit 2.

7. That the said Telegraph Company further agreed to take possession of telegraph property of the Railway Company on the first day of January, 1889, and thereafter to furnish all materials necessary for the maintenance and repair of said lines and of any extensions thereof that might thereafter be made, and all battery, instruments and apparatus necessary for operating the same, together with blank
89 forms and stationery necessary for the commercial telegraph business at all points along the line of said Railway at which a telegraph office was then or might thereafter be maintained;

8. That the Telegraph Company further agreed to pay to the Railway Company the sum of eighty seven thousand dollars ($87,000) in three equal payments of twenty nine thousand dollars ($29,000) on July 1, 1889, and on January 1, and July 1, 1890;

9. That the Telegraph Company agreed to transmit free over its lines beyond said railway telegraph lines, business of the Railway Company to the extent of ten dollars ($10) (subsequently, under contract dated November 5, 1902, between said Chicago Great Western Railway and your petitioner changed to twelve dollars ($12)) per mile per annum, including any extensions that might thereafter be made of said railway, said business being charged at the regular rates of the Telegraph Company, and for such purpose the Telegraph Company would issue to such officers of the Railway Company as might be designated by the President, Vice President or General Manager thereof, annual franks of the Telegraph Company, authorizing such free transmission of messages relating strictly to the railway or corporate business of the Railway Company, originating at or destined to points on the Telegraph Company's line within the United States, either upon or off the line of said Railway; and in case the telegraph business of said Railway beyond its lines should amount to more than twelve dollars ($12) per mile of railway per annum, the excess should be paid for at one-half the regular rates of the Telegraph Company. It was understood, however, that such telegraph service applied only to the transmission of messages concerning business of the Railway Company, and should not be extended to messages for transmission by ocean cable, nor to messages ordering sleep-

ing car, parlor car, or steamer berths, or other accommo-
90 dations for customers of the Railway Company;

10. It was further provided that the business of the Railway Company should have precedence over all other business upon the wires set apart for the use of the Railway Company, and that the Railway Company should have the full use of all the wires then in operation and of two wires upon any extensions of said railway that might thereafter be made, in case the Railway Company required the same, free of charge;

11. That it was further provided that in case the Railway Company should require the use of additional wire or wires for railway business, over and above the two wires hereinbefore mentioned, the same shall be paid for by the Railway Company, and in case an additional wire or wires should be required for commercial business, the same shall be paid for by the Telegraph Company, and, in either case, such additional wire or wires should come in under the agreement as to maintenance, repairs and renewals. In case the two wires, or either of them, set apart for the use of the Railway Company, should at any time be unfit for use, the Railway Company should have the free use of such of the wires set apart for commercial business as might be necessary to transact its business until the wires set apart for it should be put in fit condition for use;

12. That it was further provided that the provisions of said agreement should be and continue in force for ninety nine (99) years from the date thereof.

13. Your petitioner further shows that under agreement dated the 26th day of December, 1903, by and between the Mason City and Fort Dodge Railway Company and your petitioner a contract substantially similar to the last mentioned contract was entered into between said railway company and your petitioner; to continue in force, however, for eighty four
(84) years from the date thereof, so as to expire at or
91 about the same time that the original contract between the Chicago Great Western Railway Company and petitioner expires, which contract is attached and made part hereof as Exhibit "B."

14. Your petitioner alleges that both said Railway Companies and your petitioner have each faithfully performed their respective duties and obligations undertaken by each of them under said several contracts until the filing of the bill of complaint herein and the appointment of said receivers by

this Honorable Court to take charge of and manage said Chicago Great Western Railway; Def Ex

15. That subsequently to the appointment of said receivers, the said receivers elected to abide by and perform said contracts with your petitioner, and have ever since their appointment as said receivers, adhered to and complied with the terms of said contracts, so far as the Chicago Great Western Railway was bound to comply with and perform said contracts and your petitioner has likewise rendered the same service and duties to the receivers that it was under said contract bound to render to and perform for the said Railway Company prior to the appointment of said receivers and that, by such action, the receivers have ratified and confirmed said contracts with your petitioner and the same are now in full force and effect and binding upon said receivers.

16. Your petitioner further shows that, under Section three (3) of said agreement of December 26, 1888 it is the duty of said Railway Company to transport free of charge over its railway, upon application of the Superintendent or other officer of the Telegraph Company, employees of the Telegraph Company when traveling upon the business of said Telegraph Company.

17. That by reason of a great sleet storm in the territory east of the City of Chicago, late in the month of Feb-
92 ruary, 1909, a considerable portion of your petitioner's telegraph wires and poles were broken and communication was interrupted between the east and the west; that in such instances which have occurred each year in the past your petitioner and the Western Union Telegraph Company and the telephone companies find it necessary to draft every available lineman from the territory not affected by atmospheric disturbances to the place or places where there is a general breaking down or destruction of the telegraph lines, in order to reconstruct and repair such lines in the shortest possible time; that the necessity for such reconstruction is always imperative and that the linemen and snupervising officers are required to and do work almost continuously until such repairs and reconstruction has been effected and communication has been re-established, your petitioner averring that it is not uncommon for men to work 24 and 36 hours continuously in such labors; and that the said breaking of your petitioner's wires and lines was so extensive that linemen were immediately drafted from the territory west of

Chicago, including linemen from Minneapolis and St. Paul in to the territory east of Chicago, and that upon the completion of said labors and reconstruction of the telegraph lines, said linemen were returned to their home stations.

18. That four (4) of such telegraph linemen after restoration of the lines, and on March 1, returned to the City of Chicago for the purpose of returning to their homes at Minneapolis and St. Paul, and your petitioner, in accordance with the terms of the contract between it and said receivers, applied to said receivers for free transportation for said four (4) linemen from Chicago to St. Paul; that said free transportation could not be obtained from the headquarters of said receivers at St. Paul, Minnesota, and to save the time of said four men, your petitioner purchased tickets for said four linemen over said receiver's railway from Chicago
93 to St. Paul, and paid therefor the regular rate of fare at eight dollars each, or thirty two dollars (32) for the total fares.

19. That subsequently thereto, your petitioner applied to said receivers for a refund of said thirty two dollars ($32) so paid by your petitioner for the fares of said linemen, upon the ground that your petitioner was entitled to free transportation for said linemen under Section three of your petitioner's contract aforesaid;

20. That in reply to your petitioner's demand said receivers declined to refund to your petitioner said sum of thirty two dollars ($32), alleging as a reason for such refusal that the men in question were engaged on your petitioner's lines east of Chicago; that they did not come to Chicago for the purpose of doing any work on the Chicago Great Western Railway right of way, nor were they returning to St. Paul for the purpose of doing any work upon said right of way, wherefore said receivers refused to refund said fares; said receivers justified their refusal to refund upon the ground that the Interstate Commerce Commission had ruled that free transportation under the Hepburn Act could not be given to telegraph employees notwithstanding the existence of a contract between a railway company and a telegraph company requiring the railway company to issue to the telegraph company free transportation to its employees under circumstances and facts similar to those hereinbefore stated by your petitioner.

21. Your petitioner alleges that the terms of the contract

between your petitioner and said Chicago Great Western Railway Company as adopted by said receivers, as hereinbefore set forth, requires the receivers to issue to your petitioner free transportation for its linemen and employees, whether said linemen are to be employed upon the right of way or are upon a journey with that purpose in view, or
94 are to be employed or have been employed by your petitioner's telegraph lines upon other railways or highways than said Chicago Great Western Railway's right of way, and that said contract does not, by its terms and was not intended in spirit, to limit said free transportation of employees to those only who were to render or were rendering service upon or in connection with the telegraph lines of your petitioner upon said Chicago Great Western Railway.

Defen Exh

22. Your petitioner alleges that under Section one of the Act approved June 29, 1906, known as the Hepburn Act, and intended to prevent discrimination by common carriers, railway companies are expressly authorized to issue free transportation to linemen of telegraph and telephone companies, and neither the spirit of said act nor the express words thereof indicate any intention to limit the carriers' right to issue such free transportation solely to such telegraph and telephone linemen as shall be or shall have been engaged in rendering service to the telegraph or telephone company upon the line of the railway company granting such free transportation.

23. Your petitioner upon advice of counsel alleges that, even if its claim to such free transportation shall be held not to be within the exceptions set forth in said Hepburn Act, yet its claims to free transportation of its employees is, under its said contract, protected by the Constitution of the United States, notwithstanding the terms of said Hepburn Act, and that said Act cannot rightfully be so construed as to impair the obligation of said contract and to discharge the Railway Company and its receivers from obligations and duties resting upon them to the injury, prejudice and great money loss annually of your petitioner during the life of said contract.

24. Your Petitioner therefore insists that it is entitled to a refund of said sum of thirty two dollars ($32) and it
95 prays that an order may be entered requiring said receivers to answer this petition upon a short day to be fixed by the court and that a hearing may be had upon any question

of fact which may be raised by this petition and said answer, and that, upon a hearing thereof, said receivers may be directed and ordered by this honorable court to refund to your petitioner the said sum of thirty two dollars ($32) so as aforesaid paid by it to said receivers for the transportation of its linemen from Chicago to St. Paul as aforesaid.

And your petitioner will ever pray, etc.

POSTAL TELEGRAPH CABLE COMPANY
Petitioner
By T. W. CARROLL
General Superintendent.

LOESCH SCOFIELD & LOESCH
Solicitors for Petitioner.
FRANK J. LOESCH
Of Counsel.

State of Illinois, } ss.
County of Cook. }

T. W. Carroll, being first duly sworn, says that he is the General Sup't. of the Postal Telegraph-Cable Company, the Petitioner in the foregoing petition; that he has read said petition and knows the contents thereof, and that the same is true.

T. W. CARROLL

Subscribed and sworn to before me this 14th day of May, A. D. 1909.

ANNA W. PORTER
Notary Public.

(Seal)

96 EXHIBIT A.

This Agreement made and entered into this 26th day of December, 1888, by and between the Chicago, St. Paul and Kansas City Railway Company, a corporation organized under the laws of the State of Iowa, party of the first part, and the Postal Telegraph-Cable Company, a corporation organized under the laws of the State of New York, party of the second part, hereinafter designated as the Railway Company and the Telegraph Company respectively:

Witnesseth:

That Whereas, the Railway Company owns and operates a railway extending from the City of Chicago, Illinois, to

Minneapolis, Minnesota, via Dubuque, Oelwein, Iowa, and St. Paul, Minnesota, and from Oelwein via Marshalltown and Des Moines, Iowa, to St. Joseph, Missouri, with branches from Dubuque Junction to Lyle, Minnesota, from Sumner to Hampton, and from Wilson Junction to Cedar Falls, Iowa, and contemplates extending its railway in the near future, by lease or otherwise, from St. Joseph to Kansas City, Mo., and whereas the Railway Company owns and operates a line of telegraph consisting of poles and two wires covering nearly the whole route of said railway as above described, together with the necessary batteries, machinery, and apparatus necessary for operating the same;

Defend Exh

And Whereas the Telegraph Company owns and operates lines of telegraph reaching the principal cities in the United States north of and including St. Louis, Cincinnati, and Washington City, and east of the Missouri River, and by its connections, the principal cities and towns in British America and on to the Pacific Coast, and via the Commercial Cable Company to points in the Old World that are reached by
97 telegraph, and is engaged in extending its lines into the Southern States and is desirous of including within its system the lines of telegraph of the said Railway Company;

Now Therefore for and in consideration of the covenants and agreements herein contained, the parties hereto have mutually agreed as follows:

1. The Railway Company agrees that the Telegraph Company may take charge of the telegraph lines and property of the Railway Company as hereinbefore described, on the first day of January, 1889, and that, so far as it legally may, it hereby grants and agrees to assure to the Telegraph Company the exclusive right of way on and along the line, lands and branches of the Railway Company, and on any extensions and branches thereof, for the construction and use of lines of poles and wires, and underground or other lines for commercial and public uses or business, with the right to put up and construct from time to time such additional wires, or such additional lines of poles as the Telegraph Company may find necessary for its business, and the Railway Company agrees to clear and keep clear said right of way of all trees, undergrowth and other obstructions to the construction and maintenance of the lines and wires provided for herein, and the Railway Company will not, unless legally bound so to do, transport men or materials for the construction or operation of a line of poles or wires or underground,

or other lines in competition with the lines of the Tele-
98 graph Company, party hereto, except at and for the Rail-
way Company's regular local rates, nor will it furnish for any competing line any facilities or assistance that it may lawfully withhold, nor stop its trains, nor distribute material therefor at other than regular stations, provided always, that in protecting and defending the exclusive rights conveyed by this contract, the Telegraph Company may use and proceed in the name of the Railway Company, but shall indemnify and hold harmless the Railway Company from any and all damages, costs, charges and legal expenses incurred therein or thereby.

II. The Railway Company agrees to furnish all labor necessary for the maintenance, repairs and renewals of said telegraph lines, and for any extensions thereto that may hereafter be made upon property that is now or may hereafter be owned or controlled by the Railway Company, and to furnish office room in its railway stations, and that its railway telegraph operators shall handle the business of the Telegraph Company at all stations along the line of said railway, except at such places as the Telegraph Company may establish a separate office for the better accommodation of the telegraph business of such places. It is understood and agreed, however, that whenever the commercial or public business at any office maintained by the Railway Company shall become greater than can be properly carried on by the operator or operators employed by the Railway Company,
then the Telegraph Company shall furnish and pay for
99 its own operating service at such office. And it is agreed
that the employes of the Railway Company in the performance of their duties in connection with the maintenance and operation of said telegraph lines, shall observe the rules and regulations of the Telegraph Company applicable thereto, and shall exercise the same care and diligence in the maintenance and repair of the wire or wires that the Telegraph Company has or may have along said railway for its business, and in the transaction of the commercial telegraph business, as in the maintenance and repair of the wire or wires of the Railway Company, and in the transaction of the telegraph business of the Railway Company.

III. The Railway Company agrees to transport free of charge over its railway, upon application of the superintendent or other officer, of the Telegraph Company, employes of the Telegraph Company, when travelling upon the business

of said Company, and also to transport and distribute free Defen Exh
of charge along the line of its railway all poles or other material and supplies for the construction, maintenance, renewal repair and operation of the lines and wires covered by this agreement, and of such additional lines of poles and wires as may be erected under the provisions of this agreement, and also of material and supplies for the establishment, maintenance, and operation of the offices of both parties hereto at places along and adjacent to said railway.

IV. The Telegraph Company agrees to take possession of the telegraph property of the Railway Company on the first day of January, 1889, and thereafter to furnish all
100 materials necessary for the maintenance and repair of said lines, and of any extensions thereof that may be hereafter made, and all battery, instruments, and apparatus necessary for operating the same, together with all blank forms and stationery necessary for the transaction of a commercial telegraph business at all points along the line of said railway at which a telegraph office is now, or may hereafter be maintained.

V. The Telegraph Company agrees, if requested so to do by the Railway Company, to promptly construct a substantial telegraph line upon any extension of railway which the Railway Company may make, and to string thereon two wires, which shall be for the exclusive use of the Railway Company, if the business of the Railway Company requires it.

VI. The Telegraph Company agrees to pay to the Railway Company the sum of Eighty-seven thousand dollars ($87,000) in three equal payments of Twenty-nine thousand dollars, ($29,000) on the first of July 1889, the first of January, and the first of July 1890, respectively, for which sums it will give its promissory notes, with interest at the rate of five per cent per annum, upon the execution of this agreement.

VII. The Telegraph Company agrees to transmit free over its lines beyond said Railway telegraph lines, business of the Railway Company to the extent of $10.—per mile of railway per annum, including any extensions that may hereafter be made of said railway, such business being charged at the regular rates of the Telegraph Company, and for this purpose the Telegraph Company will issue to said of-
101 ficers of the Railway Company as may be designated by the President, Vice-President, or General Manager there-

of, annual franks of the Telegraph Company, authorizing such free transmission of messages relating strictly to the railway or corporate business of the Railway Company, originating at or destined to points on the Telegraph Company's line within the United States, either upon or off the line of said railway; and in case the telegraph business of the Railway Company beyond its lines shall amount to more than $10 per mile of railway per annum, the excess shall be paid for at one-half the regular rates of the Telegraph Company. It is understood and agreed, however, that the telegraph service herein provided for, applies only to the transmission of messages concerning business of the Railway Company, and shall not be extended to messages for transmission by Ocean Cable, nor to messages ordering sleeping car, parlor car, or steamer berths, or other accommodations for customers of the Railway Company, the tolls upon which should properly be chargeable to such customers.

VIII. It is mutually understood and agreed that the business of the Railway Company shall have precedence over all other business upon the wires set apart for the use of the Railway Company, and that the Railway Company shall have the full use of all the wires now in operation, and of two wires upon any extensions of said railway that may hereafter be made in case the Railway Company require the same, free of charge; but that until the Railway Company shall find it necessary to have the sole use of said wires, the Com-
102 mercial business of the Telegraph Company shall also be done over the said wires. In case the Railway Company shall require the use of an additional wire or wires for railway business over and above the two wires hereinbefore mentioned, the same shall be paid for by the Railway Company, and in case an additional wire or wires shall be required for commercial business, the same shall be paid for by the Telegraph Company, and in either case, such additional wire or wires shall come in under the term of this contract as to maintenance, repairs, and renewals. In case the two wires, or either of them, set apart for the use of the Railway Company, shall be at any time unfit for use the Railway Company shall have the free use of such of the wires set apart for commercial business as shall be necessary to transact its business until the wires set apart to it shall be put in fit condition for use.

IX. It is mutually understood and agreed, that the Railway Company is not to be responsible for, and the Telegraph

Company hereby agrees to save harmless the Railway Company, and indemnify it against any loss or damages that may arise from any neglect or failure in the transmission or delivery of messages for any person doing business with the Telegraph Company, and on account of any other public telegraph business, nor shall the Railway Company be liable to the Telegraph Company for any defalcation or embezzlement of moneys received for the Telegraph Company by the Railway Company's operators, when such operators are acting as agents of the Telegraph Company; Nor for any loss,
103 damage or liability of any kind arising from any injury to persons in the employ of, or property belonging to said Telegraph Company, while being carried free over said Railway; and the Telegraph Company shall not be responsible for, and the Railway Company agrees to indemnify and save harmless the Telegraph Company, against any loss or damages arising from, or on account of any error, delay, or default in the transmission or delivery of any message sent for the Railway Company under this agreement.

X. It is mutually understood and agreed that the Railway Company shall have the right to establish telegraph stations at such places along the line of said railway as it may deem necessary, and at all such stations the Telegraph Company agrees to supply instruments, local batteries, and blank forms and stationery for local business, as hereinbefore provided.

XI. It is mutually understood and agreed that the Railway Company shall have the right to the free use of any patent right, or any new discoveries or inventions that the Telegraph Company now owns or may hereafter own or use in its telegraph business, so far as the same may be necessary and convenient for carrying on the telegraph business of the said lines of the said Railway Company.

XII. The provisions of this agreement shall be and continue in force for ninety-nine years from the date hereof, and in case of any disagreement concerning the true intent and meaning of any of the provisions of this contract, the subject of such differences shall be referred to three arbitrators; one to be chosen by each of the parties hereto, and
104 the third by the two thus chosen, and the decision of such arbitrators, or a majority thereof, shall be final and conclusive.

In Witness Whereof the parties hereto have caused the names of their respective Presidents to be hereto subscribed

and their corporate seals to be attested, the day and year first above written.

CHICAGO, ST. PAUL & KANSAS CITY RAILWAY COMPANY,
By A. B. STICKNEY,
President.

(Corporate Seal)
Attest:
JOHN I. THOMPSON,
Assistant Secretary.

POSTAL TELEGRAPH-CABLE COMPANY,
By F. B. CHANDLER,
President.

(Corporate Seal)
Attest:
I. O. STEVENS,
Asst. Secretary.

105 Memorandum of Agreement, made this—fifth—day of —February—1902, by and between the Chicago Great Western Railway, a corporation duly organized and existing under the laws of the State of ..... and the Postal Telegraph-Cable Company, a corporation duly organized and existing under the laws of the State of New York:

It is mutually agreed that the seventh clause (VII) of the agreement made and entered into December 26th, 1888, by and between the Chicago, St. Paul and Kansas City Railway Company, a corporation organized under the laws of the State of Iowa, and the said Postal Telegraph-Cable Company (the Chicago Great Western Railway Company as successor of the Chicago, St. Paul and Kansas City Railway Company having assumed said agreement), shall be and the same hereby is cancelled and the following clause substituted therefor, in effect from this date:

VII. The Telegraph Company agrees to transmit free over its lines beyond said railway telegraph lines, business of the Railway Company to the extent of Twelve dollars ($12) per mile of railway per annum, including any extensions that may hereafter be made of said railway, such business being charged at the regular day rates of the Telegraph Company from the point where any such message originates, to the final destination, all such railway messages in the Telegraph Company's possession to be regarded as handled by them from point of origin to destination, and for this purpose the Telegraph Company will issue to such officers of the Railway Company as may be designated by the President, Vice-President, or General Manager thereof, annual franks of the Telegraph

Company, authorizing such free transmission of messages relating strictly to the railway or corporate business of the Railway Company originating at or destined to points on the Telegraph Company's line, within the United States, either upon or off the line of said railway; and in case the telegraph business of the Railway Company beyond its lines shall amount to more than twelve dollars ($12) per mile of railway per annum, the excess shall be paid for at one-half the regular rates of the Telegraph Company. It is understood and agreed, however, that the telegraph service herein provided for applies only to the transmission of messages concerning business of the Railway Company, and shall not be extended to messages for transmission by ocean cable, nor to messages ordering sleeping car, parlor car, or steamer berths, or other accommodations for customers of the Railway Company, and the tolls upon which should properly be chargeable to such customers. Defe Ex

In Witness Whereof the parties hereto have caused these presents to be signed and their corporate seals to be hereunto affixed and attested by their respective officers, duly authorized so to do, the day and year first above written.

CHICAGO GREAT WESTERN RAILWAY
By SAML STICKNEY
General Manager.

(Corporate Seal)
Attest:
R. C. WRIGHT,
Secy.

POSTAL TELEGRAPH-CABLE COMPANY,
By W. H. BAKER,
Vice-President.

(Corporate Seal)
Attest:
CHAS. P. BRUSH,
Asst. Secretary.

106 EXHIBIT B.

This Agreement, Made and entered into this 26th day of December, 1903, by and between the Mason City & Fort Dodge Railway Company, a corporation organized under the laws of Iowa, party of the first part, and the Postal Telegraph-Cable Company, a corporation organized under the laws of the State of New York, party of the second part, hereinafter designated as the Railway Company and the Telegraph Company, respectively.

Witnesseth:

That Whereas, The Railway Company owns and operates a railway extending from the City of Oelwein, Iowa, to Waverly, Iowa, and

Whereas, The Railway Company is desirous of obtaining the use of a line of telegraph covering the whole route of said railway as above described together with the batteries, machinery and apparatus necessary for operating the same and to that end permitted the Telegraph Company to enter upon the premises of the Railway Company for the purpose of constructing said line of telegraph which has been already partially constructed.

Now Therefore, For, and in consideration of the covenants and agreements herein contained the parties hereto have mutually agreed as follows:

1. The Railway Company agrees that the Telegraph Company may construct so far as the same is not already constructed, a telegraph line upon the property of the Railway Company as hereinbefore described to be completed ready for use on the first day of January, 1904, and that so far as it legally may it hereby grants and agrees to assure to the
107 Telegraph Company the exclusive right of way on and along the line and lands of the Railway hereinbefore described, and on any extensions and branches thereof for the construction and use of lines of poles and wires, and underground or other lines for Commercial and Public uses or business, with the right to put up and construct from time to time such additional wires, or such additional lines of piles as the Telegraph Company may find necessary for its business, and the Railway Company agrees to clear and keep clear said right of way of all trees, undergrowth and other obstructions to the construction and maintenance of the lines and wires provided for herein, and the Railway Company will not, unless legally bound to do so transport men or materials for the construction or operation of a line of poles or wires or underground, or other lines in competition with the lines of the Telegraph Company party hereto, except at and for the Railway Company's regular local rates nor will it furnish for any competing line any facilities or assistance that it may lawfully withhold, nor stop its trains, nor distribute material therefor at other than regular stations; provided, always that in protecting and defending the exclusive rights conveyed by this contract, the Telegraph Company may use and proceed in the name of the Railway Company but shall indemnify and hold

harmless the Railway Company from any and all damages costs charges and legal expenses incurred therein or thereby.

II. The Railway Company agrees to furnish all labor necessary for the maintenance, repairs and renewals of said telegraph lines, and for any extensions thereto that may
108 hereafter be made upon property that is now or may be hereafter owned or controlled by the Railway Company, and to furnish office room in its railway stations, and that its railway telegraph operators shall handle the business of the Telegraph Company at all stations along the line of said railway except at such places as the Telegraph Company may establish a separate office for the better accommodation of the telegraph business of such places. It is understood and agreed however, that whenever the commercial or public business at any office maintained by the Railway Company shall become greater than can be properly carried on by the operator or operators employed by the Railway Company, then the Telegraph Company shall furnish and pay for its own operating service at such office. And it is agreed that the employes of the Railway Company in the performance of their duties in connection with the maintenance and operation of said telegraph lines, shall observe the rules and regulations of the Telegraph Company applicable thereto, and shall exercise the same care and diligence in the maintenance and repair of the wire or wires that the Telegraph Company has or may have along said railway for its business, and in the transaction of the commercial telegraph business, as in the maintenance and repair of the wire or wires of the Railway Company, and in the transaction of the telegraph business of the Railway Company.

III. The Railway Company agrees to transport free of
109 charge over its railway, upon application of the Superintendent or other officer of the Telegraph Company, employes of the Telegraph Company when traveling upon the business of said Company, and also to transport and distribute free of charge along the line of its railway as above described all poles or other material and supplies for the construction, maintenance, renewal, repair and operation of the lines and wires covered by this agreement, and of such additional lines of poles and wires as may be erected under the provisions of the agreement, and also of material and supplies for the establishment, maintenance and operation of the offices of both parties hereto at places along and adjacent to said railway.

IV. The Telegraph Company agrees to construct so far as the same is not already constructed a substantial telegraph line, with at least two wires, which shall be for the exclusive use of the Railway Company if the business of the Railway Company requires it, and complete it ready for use upon and along the property of the Railway Company on or before the first day of January, 1904, and thereafter to furnish all materials necessary for the maintenance and repair of said line, and any extensions thereof that may be hereafter made, and all battery, instruments, and apparatus necessary for operating the same, together with all blank forms and stationery necessary for the transaction of a commercial telegraph business at all points along the line of said railway at which a telegraph office is now or may hereafter be maintained.

110 V. The Telegraph Company agrees, if requested so to do by the Railway Company, to promptly construct a substantial telegraph line upon any extension of railway which the Railway Company may make, and to string thereon two wires, which shall be for the exclusive use of the Railway Company, if the business of the Railway Company requires it.

VI. The Telegraph Company agrees during the continuance of this contract to transmit free over its lines beyond said railway telegraph lines, business of the Railway Company (and of the Chicago Great Western Railway Company so long as the said Chicago Great Western Railway Company operates and controls the said line of railway along which said telegraph line is to be completed as aforesaid) to the extent of twelve ($12.00) dollars per annum per mile of railway as above described, including any etxensions that may hereafter be made and brought under the operation of this contract, such business being charged at the regular day rates of the Telegraph Company from the point where any such messages originates to the final destination, all such Railway messages in the Telegraph Company's possession to be regarded as handled by them from point or origin to destination, and for this purpose the Telegraph Company will issue to such officers of the Railway Company, or of the Chicago Great Western Railway Company, as may be designated by the President Vice President, or General Manager thereof,

111 annual franks of the Telegraph Company, authorizing such transmission of messages relating strictly to the railway or corporate business of the Railway Company, originating at or destimes to points on the Telegraph Company's

line within the United States, either upon or off the lines of said railway; and in case the telegraph business of the Railway Company (or of the Chicago Great Western Railway Company, as aforesaid) beyond its lines shall amount to more than twelve ($12.00) dollars per mile of railway per annum the excess shall be paid for at one half the regular rates of the Telegraph Company. It is understood and agreed however, that the Telegraph Service herein provided for is to be in addition to like service to which either company may be entitled to under other contracts with the Telegraph Company and it applies only to the transmission of messages concerning business of the Railway Company, and shall not be extended to messages for transmission by Ocean Cable, nor to messages ordering sleeping car, parlor car or steamer berths or other accommodiations for customers of the Railway Company, the tolls upon which should properly be chargeable to such customers.

VII. It is mutually understood and agreed that the business of the Railway Company shall have precedence over all other business upon the wires set apart for the use of the Railway Company, and that the Railway Company shall have the full use of two wires upon all the railway covered by this agreement and any extensions thereof in case the Railway Company require the same, free of charge; but that until
112 the Railway Company shall find it necessary to have the sole use of said wires the commercial business of the Telegraph Company shall also be done over the said wires. In case the Railway Company shall require the use of an additional wire or wires for railway business over and above the two wires hereinbefore mentioned the same shall be paid for by the Railway Company and in case an additional wire or wires shall be required for commercial business the same shall be paid for by the Telegraph Company, and in either case, such additional wire or wires shall come under the terms of this contract as to maintenance, repairs and renewals. In case the two wires or either of them, set apart for the use of the Railway Company shall be at any time unfit for use the Railway Company shall have free use of such of the wires set apart for commercial business as shall be necessary to transact its business until the wires set apart to it shall be put in fit condition for use.

VIII: It is mutually understood and agreed that the Railway Company is not to be responsible for, and the Telegraph

Company hereby agrees to save harmless the Railway Company and indemnify it against any loss or damage that may arise from any neglect or failure in the transmission or delivery of messages for any person doing business with the Telegraph Company, and on account of any other public telegraph business, nor shall the Railway Company be liable to the Telegraph Company for any defalcation or embezzlement of moneys received for the Telegraph Company by the Railway Company's operators, when such operators are acting
113 as agents of the Telegraph Company; nor for any loss, damage or liability of any kind arising from any injury to persons in the employ of, or property belonging to said Telegraph Company, while being carried free over said railway, and the Telegraph Company shall not be responsible for, and the Railway Company agrees to indemnify and save harmless the Telegraph Company against any loss or damages arising from, or on account of any error, delay or default in the transmission or delivery of any messages sent for the Railway Company under this agreement.

IX. It is mutually understood and agreed that the Railway Company shall have the right to establish telegraph stations at such places along the line of said railway as it may deem necessary, and at all such stations the Telegraph Company agrees to supply instruments, local batteries and blank forms and stationery for local business as hereinbefore provided.

X. It is mutually understood and agreed that the Railway Company shall have the right to the free use of any patent right, or any new discoveries or inventions that the Telegraph Company now owns or may hereafter own or use in its telegraph business, so far as the same may be necessary and convenient for carrying on the telegraph business of the said lines of the said Railway Company.

XI. The provisions of this agreement shall be and continue in force for eighty-four (84) years from the date hereof, and in case of any disagreement concerning the true
114 intent and meaning of any of the provisions of this contract the subject of such difference shall be referred to three arbitrators; one to be chosen by each of the parties hereto, and the third by the two chosen, and the decision of such arbitrators, or a majority thereof, shall be final and conclusive.

In Witness Whereof, The parties hereto have caused the

names of their respective presidents to be hereunto subscribed and their corporate seals to be attested the day and year first above written. Def. E

MASON CITY & FORT DODGE RAILWAY COMPANY,

By R. C. WRIGHT,
Vice President.

Attest:
CHAS A. TALMAN,
Asst. Secretary.

Form approved:
A. G. BRIGGS,
General Attorney.

POSTAL TELEGRAPH-CABLE COMPANY,
By W. H. BAKER.
Vice Pres. & Genl. Mgr.

Attest:
CHAS. P. BRUCH,
Asst. Secretary.

Approved for execution
General Manager.

(Endorsed) Filed May 20, 1909, H. S. Stoddard, Clerk.

115 And afterwards to-wit: on the eighth day of June, 1909, came the receivers in said entitled cause by their solicitors, and filed in the clerk's office of said court, their certain Demurrer to the intervening petition of the Post Telegraph-Cable Company. Said Demurrer is in words and figures following to-wit:

United States of America,
Northern District of Illinois,
Eastern Division.

IN THE CIRCUIT COURT OF THE UNITED STATES

For the Northern District of Illinois,

Eastern Division.

John A. Humbird, *et al.*,
Complainants,
—*vs*—
Chicago Great Western Railway Company,
Defendant.
In Equity.

Demurrer of Charles H. F. Smith, and Horace G. Burt, To Petition of Intervention of Postal Telegraph Company.

To the Honorable Judges of said Court, in Chancery Sitting:

Charles H. F. Smith and Horace G. Burt, as Receivers of the Chicago Great Western Railway by protestation not confessing or acknowledging all or any of the matters or things in the petition of intervention of the Postal Telegraph Cable Company contained to be true, in such manner and form as the same are therein set forth and alleged, demur to the said bill, and for cause of demurrer show:

1. That said petitioner, Postal Telegraph Cable Company in and by said petition made or stated any such cause as doth or ought to entitle it to any such relief as is thereby sought and prayed for, and that it appears by the said petitioners
116 own showing by said petition, that it is not entitled to such relief.

2. That said petition of the said petitioner, the Postal Telegraph Cable Company, is wholly without equity.

3. That it does appear from said petition of intervention that petitioner seeks only to recover certain sums paid by it to these Receivers for the transportation of certain employes of petitioner over the line of railway operated by these Receivers, which said sums petitioner was legally bound to pay, and which these Receivers might not legally refund to petitioner.

Wherefore, and for divers other good causes of demurrer

appearing in said petition, said Receivers demur thereto and pray judgment of his Honorable Court, whether they should be compelled to make further or any answer to said bill, and they pray further to be hence dismissed with their reasonable costs in their behalf sustained.

GARDNER, STERN & ANDERSON and H. LOOMIS,
Solicitors for Receivers.

A. G. BRIGGS,
Of Counsel.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

Dated this 7th day of May, 1909.

A. G. BRIGGS,
Of Counsel for Receivers.

117 State of Minnesota } ss.
County of Ramsey. }

Charles H. F. Smith makes solemn oath and says, that he is one of the Receivers of the Chicago Great Western Railway Company, against whom judgment is sought to be obtained by the Petition of Intervention of the Postal Telegraph Company; that the foregoing demurrer is not interposed for the purpose of delay, and that the same is true in point of fact.

CHAS. H. F. SMITH.

Subscribed and sworn to before me this 7th day of June, 1909.

G. F. PHILLEO,
(Seal) *Notary Public,*
Ramsey County, Minnesota.

My Commission expires Nov., 18, 1909.

(Endorsed) Filed June 8, 1909, H. S. Stoddard, Clerk.

And afterwards to-wit: on the sixteenth day of March, 1909, came the Special Master and filed in the clerk's office of said court his report on the Intervening petition of the Postal Telegraph-Cable Company. Said report is in words and figures following, to-wit:

118 IN THE CIRCUIT COURT OF THE UNITED STATES

Northern District of Illinois

Eastern Division.

John A. Humbird, *et al.*,
Complainants,
vs.
Chicago Great Western Railway Company,
Defendant.

Notice is hereby given that I have drafted my report upon the intervening petition of the Postal Telegraph-Cable Company. A copy of said draft is hereto attached.

Notice is further given that I will hear any objections that you may have to my said report as so drafted at the office of the Clerk of the Circuit Court of the United States, in the city of Chicago, Illinois, on the 16th day of March 1910, at 10 o'clock in the forenoon, and at the said place and time I will settle my said report and you are then and there required to file any exceptions which you may have to my said report as so settled. Under existing orders exceptions not so filed at said time will not be considered by the Court.

(Signed) A. R. MOORE
Special Master.

Dated St. Paul Minn., March 4th, 1910.

To

Messrs. Loesch, Schofield & Loesch,
Attorneys for the Postal Teleg.-Cable Co., Petitioner, The Temple, Chicago, Ill.

To

Messrs. Winston, Payne, Strawn & Shaw, Attorneys for the Receivers and the C. G. W. R. R. Co., First. Natl. Bank Building, Chicago, Ill.

119 IN THE CIRCUIT COURT OF THE UNITED STATES

Northern District of Illinois

Eastern Division.

John A. Humbird, *et al.*, *Complainants*,
vs.
Chicago Great Western Railway Company, *Defendant.*

To the Honorable Judges of the Circuit Court, Above Named, in Chancery Sitting:

In Re Intervening Petition of the Postal Telegraph-Cable Company.

The petition of the Postal Telegraph-Cable Company above referred to was filed in the office of the Clerk of the above entitled Court on the 20th day of May 1909, and was thereafter transmitted by said clerk to me for my consideration, pursuant to an order made and entered in the above proceedings by the terms of which all intervening petitions filed in this cause by which the intervener seeks to recover any money or any property from the Receivers were referred to me for my investigation and report.

Thereafter and on or about the 8th day of June, 1909, the Receivers filed their demurrer to said intervening petition and assigned as the grounds thereof—

1—That said petitioner, Postal Telegraph-Cable Company, in and by said petition has not made or stated any such cause as doth or ought to entitle it to any such relief as is thereby sought and prayed for, and that it appears by the said petitioners own showing by said petition, that it is not entitled to such relief.

120 2. That said petition of the said petitioner, the Postal Telegraph-Cable Company, is wholly without equity.

3. That it doth appear from said petition of intervention that petitioner seeks only to recover certain sums paid by it to these Receivers for the transportation of certain employes of petitioner over the line of railway operated by these Receivers, which said sums petitioner was legally bound to pay,

and which these receivers might not legally refund to petitioner.

By agreement of Counsel said demurrer was set down for hearing before me on Tuesday, the 28th day of September 1909, at 10 o'clock A. M. at the office of the clerk of the above entitled Court. At said time and place Frank J. Loesch, Esq., appearing as Solicitor for the petitioner and Mr. F. S. Winston, as Solicitor for the petitioner, and Mr. F. S. Winston, as Solicitor for the Receivers and the C. G. W. R. R. Co. Mr. P. J. Farrell, Solictor for the Interstate Commerce Commission appeared as amicus curiae.

The question raised by said demurrer were fully argued by Counsel and briefs were submitted with reference thereto. After due consideration thereof, I respectfully report that said demurrer is well founded in point of law and should be sustained by the Court. I therefore respectfully recommend that an order be entered to that effect and that in and by the terms of said order the intervening petitioner be denied any relief by reason of the facts set up by it in its petition.

All of which is respectfully submitted.

Dated, this March 16th, 1910;

A. R. MOORE,
Special Master.

(Endorsed) Filed March 16, 1910, H. S. Stoddard, Clerk.

121 And on the same day to-wit, the sixteenth day of March, 1910 there was filed in the clerk's office of said Court in said entitled cause certain objections to Special Master's Report in words and figures following to-wit:

Def Ex

IN THE CIRCUIT COURT OF THE UNITED STATES

Northern District of Illinois

Eastern Division.

John A. Humbird *et al*
Complainants,
vs.
Chicago Great Western Railway Company,
Defendant.

In Re Intervening Petition of Postal Telegraph Cable Company.

OBJECTIONS TO SPECIAL MASTER'S REPORT.

Objections taken by the above named Intervening Petitioner to the report of A. R. Moore, the Special Master in Chancery, to whom this cause stands referred for investigation and report on the intervening petition of Postal Telegraph Cable Company.

First: For that the said Special Master has found and reports that the demurrer filed to said intervening petition is well founded in point of law and should be sustained by the Court; whereas the said Special Master should have found and reported that said demurrer to said intervening petition is not well founded in point of law and should be overruled by the Court.

Second: For that the said Special Master has recommended that an order be entered sustaining said demurrer and that in and by the terms of said order the intervening petitioner be denied any relief by reason of the facts set up by it in its petition; whereas the said Special Master should have recommended that an order be entered overruling
122 said demurrer and requiring said receivers to plead to or answer said intervening petition within a short day to be fixed by the terms of said order.

Third: For that the said Special Master should have found that the petitioner, Postal Telegraph-Cable Company by its petition has stated a cause of action which entitles it to the relief as therein prayed for;

In all of which particulars the said Intervening petitioner

objects to the said report, and submits that the same ought to be altered and varied.

(Signed) WILLIAM E. O'NEILL
Solicitor for Postal Telegraph-Cable Company, Intervening Petitioner.

The foregoing objections are each overruled and my report settled as originally drafted.

Dated March 16th, 1910.

A. R. MOORE,
Special Master.

(Endorsed) Filed March 16, 1910, H. S. Stoddard, Clerk.

And afterwards to-wit, on the fourth day of April, 1910, in the record of proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, Circuit Judge, appears the following entry to-wit:

123 John A. Humbird, *et al*
vs.
Chicago Great Western Railway Company } 28934

This cause having come on to be heard upon the written stipulation of the parties hereto by their respective attorneys, and the court being fully advised in the premises, it is hereby Ordered that the objections heretofore filed by Postal Telegraph-Cable Company to the report of the Special Master in Chancery, stand as exceptions to such report, before the Court, and that the hearing on said exceptions be, and the same is hereby set for the fourth (4th) day of May, A. D. 1910, at the hour of ten (10) o'clock A. M.

And on to-wit: the fourth day of May, 1910, in the record of proceedings thereof, in said entitled cause before the Hon. Christian C. Kohlsaat, Circuit Judge, appears the following entry, to-wit:

124 Order of Wednesday, May 4, 1910.

Def
Ex

Kohlsaat, Judge.
John A. Humbird, *et al.*,
Complainants,
vs.
Chicago Great Western Railway Company.
} No. 28934 Chancery

Now come the parties by their solicitors and now comes on to be heard the objections of the Postal Telegraph Cable Company to the special master's report heretofore filed herein, and the court having heard the arguments of counsel to conclusion overrules said objections. Thereupon it is ordered that said master's report be and the same is hereby approved. Thereupon the demurrer of the receivers to the petition of said Postal Telegraph Cable Company is heard and sustained, and it is further ordered that the said petition be and the same is hereby dismissed at the petitioner's costs.

And thereupon said petitioner enters its motion for an appeal to the Supreme Court of the United States.

125 Northern District of Illinois, } ss.
Eastern Division. }

I, T. C. MacMillan, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be true and complete copies of the certain order entered of record in the Circuit Court of the United States for the Northern District of Illinois, on the twenty-third day of January, 1908, appointing Special Master in Chancery, Intervening Petition of the Postal Telegraph-Cable Company, filed May twentieth, 1909, Demurrer of Receivers, filed June eighth, 1909, Special Master's Report, filed March 16, 1910, Objections filed to Special Master's Report March sixteenth, 1910, Order entered of record April fourth, 1910, and Order entered of record May fourth, 1910, in the cause entitled, John A. Humbird, et al. Complainants, vs. Chicago Great Western Railway Company, Defendant, as the same appear from the original records and files thereof, now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at my office, in the City of Chicago, in said District, this twenty-fourth day of April, 1916.

T. C. MacMillan,
Clerk.

(Seal)

126 Mr. Dittus: If the court please, I desire to offer in evidence extracts from pages 410 and 411 of the 31st Interstate Commerce Report, dated July 15th, 1915, relating to free passes, and so on, on railroads.

Mr. Kelly: No objection.

The Court: Just a minute. What was the date of Exhibit 2?

Mr. Dittus: Just a minute. That was May 4th, 1910.

The Court: All right. Mr. Reporter, you may mark this last document Defendant's Exhibit 3.

(Said document was thereupon marked by the reporter "Defendant's Exhibit No. 3")

The Court: Is there any objection to defendant's Exhibit 3?

Mr. Kelly: No, no objection, your Honor.

Mr. Dittus: No, there is no objection.

The Court: Very well. Defendant's Exhibit No. 3 may be admitted in evidence.

(Which said extracts from Interstate Commerce Report, being so offered and received in evidence, without objection, and having been marked Defendant's Exhibit No. 3, and the same are in the words and figures following, to-wit:)

127 EXTRACT FROM PP. 410,411 OF 31 INTERSTATE COMMERCE REP. JULY 15TH, 1915.

"IV.

"The practice of granting free transportation of passengers and private cars, although less general than formerly, in part because of prohibitory legislation upon that subject, is still a heavy burden upon the railway passenger service, and it is recommended that the practice be still further restricted by the carriers. It appears from the Commission's compilation of the answers to the questions addressed by it to the carriers, that there were issued during the eleven months ending November 30th, 1913, by seventy-eight of the roads in official classification territory 629,668 annual passes and 408,848 passes for shorter terms, including passes granted to railroad officials and employees; and in the single month of June 1913, there were issued passes for single trips to the number of $482,709. These trip passes represented 88,575,298 pasenger-miles.

"June is perhaps not a representative month, but at that rate the number of trip passes issued in the year would be approximately 5,792,500, representing over one billion passenger-miles.

The amount of travel on annual and term passes has not been determined. At the average rate of fare per passenger-mile in official classification territory in 1913, the passenger-
miles represented by trip passes alone would have yield-
128 ed in passenger revenue $18,520,000. Some of these passes were no doubt issued to employees traveling on business for the carriers, and, of course, it is not assumed that the same amount of travel would have been performed by other passengers if fares had been collected; but even a fraction of this travel would have yielded the carriers a most substantial sum in revenue if paid for at tariff rates. If to trip passes is added the travel on annual and term passes it will perhaps be found that the travel on passes exceeds 10 per cent of the total passenger travel in official classification territory.

129 Mr. Kelly: I neglected one thing that we had talked about.

Mr. Dittus: I remember we talked of stipulating that these railroad telegraph contracts with the various carriers were filed with the Interstate Commerce Commission shortly after November, 1907.

Mr. Dittus: Yes.

Mr. Kelly: Then it may be stipulated in the record that on or about November 1907, the Interstate Commerce Commission entered an order that all common carriers, subject to the Act to Regulate Commerce, should file with the Interstate Commerce Commission copies of all contracts that they had at that time, with the various telegraph companies of a similar character to the contract invoked in this case; and that subsequently to that order, such contracts of all common carriers so subject to the Act to regulate commerce, were filed with the Interstate Commerce Commission.

Mr. Dittus: Before I call the witness, I desire to refer to paragraph 4 of the Defendant's answer.

By stipulation between counsel, it is agreed that in the year 1914, the telegraphing done by the defendant for the complainant, under the contracts referred to in the amended bill of complaint, amounted to $7,985.13, at regular public rates; that during said year the railroad transportation of men by complainant for the defendant, under said contract amounted to $2,844.12 at regular public rates; that during that year

complainant furnished defendant approximately $1200.00
130 for transportation of material at regular public rates;
that in the year 1915, the telegraphing done by the defendant for the complainant, under the contracts referred to in the amended bill of complaint, amounted to $9,100.04 at regular public rates; during said year, the railroad transportation of men by complainant for the defendant under said contract amounted to $2,480.46 at regular public rates; that the transportation of material by the complainant for the defendant, in said year, amounted to not more than $1200.00 at regular public rates. I think that is substantially correct.

Mr. Kelly: The complainant is willing to make that stipulation, subject to objection, as to its competency or materiality.

Mr. Dittus: Yes.

Mr. Kelly: Have you the figures also, Mr. Dittus, as to the value of the labor, which the complainant company furnished for the maintenance and repair and construction of the telegraph lines of the telegraph company during those periods which you have mentioned.

Mr. Dittus: No.

Mr. Kelly: May it also be stipulated that the value of the services furnished by the Railroad Company, during the periods referred to by Mr. Dittus, was approximately seventy-five per cent of the total cost of maintenance of such telegraph wires, and that the balance, or twenty-five per cent. represented the value of the material furnished by the Telegraph Company.

Mr. Dittus: Is that about right, Mr. Baker?

Mr. Charles M. Baker: I don't understand the question.

Mr. Kelly: We cannot get the exact figure, Mr. Baker, but I am advised by our superintendent of telegraph that that is
the proportion. That is, the value of our labor is about
131 seventy-five per cent. while the value of the material is
twenty-five per cent. of the total cost of maintenance and repair.

Mr. Charles M. Baker: I cannot answer that question.

Mr. Dittus: I regret that my attention was not called to that prior. I have not considered that, your Honor, I don't know just how I can stipulate to that, under the present conditions, although I would like to do so.

The Court, Well, we will just hold it open.

Mr. Kelly: I don't think that is material, but if the other figures are going in, we ought to have that in too, I don't

think this question is very material. The other day, when I talked with Mr. Dittus about the case, I did not have that information.

Mr. Dittus: Mr. Baker, will you take the stand? I will call Mr. Baker, your Honor, as a witness.

CHARLES M. BAKER, called as a witness in behalf of the defendant, having been first duly sworn by the court, was examined in chief by Mr. Dittus, and testified as follows:

Live at Chicago, Illinois, General Superintendent of plant of the Postal Telegraph-Cable Company, about three years, and connected with the Postal Telegraph-Cable Company thirty-four years, in construction work near the entire time Had supervision of all the construction, furnishing of materials and the securing of rights of way and franchises
132 and overseeing of the work in general; during that time have secured rights of way for the Telegraph-Company; there are many methods of doing that. It depends largely upon the railroad the right of way is to be secured. If on a highway it is necessary to apply to the county commissioners in the county through which the lines run, and also to the road commissioners for the right of constructing the line on the highways. If the line is built upon private property we have to secure the rights from the property owners. On the highway we get releases from the property owner now. Formerly we did not. On railroads we make an attempt to secure right of way on an equitable basis. If that cannot be done, we then proceed to condemn a right of way.

Postal Telegraph-Cable Company has condemned rights of way on many railroads, on the Atchison, Topeka & Santa Fe and Mobile & Ohio, the Union Pacific, the Oregon Short Line, The Chicago & Alton, the Southern, and the Georgia Railway, and many others. In these instances the value of the right of way condemned has been determined by a jury. In other instances we have entered into agreements with the railroad companies in reference to the value of the right of way taken by the Telegraph Company. We have contracted with the following railroads for rights of way: Atchison, Topeka & Santa Fe, Union Pacific, Southern Pacific, Frisco, Rock Island, Kansas City and Southern, the Texas Pacific, Missouri, Kansas & Texas, St. Louis & Southwestern, Missouri Pacific, and the Southern Railroad, and many others.

All those railroads was a purchase for cash, not an exchange of privileges. $10 per mile has been the universal charge
133 for a perpetual right of way. The Postal Telegraph-Cable Company maintains rights of way and lines on the line of railroads. The comparative cost and convenience of maintenance of telegraph rights of way on and off the railroads very much depends upon the railroad, that is, on the number of trains that are operated over the railroad, as to getting to the source of the trouble. If a railroad has but few trains it takes much longer to get to the point of trouble than it does on a highway line. I don't figure that there is any difference in the cost of maintenance of a line on and off the railroad. The only advantage in the highway road would be the ability to get to the scene of trouble quickly, and the obvious disadvantage would be the presence of trees which we would not have any right to trim more than was necessary.

I was connected with the Postal Telegraph-Cable Company at the time this contract was entered into, in December, 1888, I think I am familiar with the number of miles of telegraph lines that they had in operation at that time. I examined the line at that time or soon thereafter. It consisted of a line of telegraph poles carrying two wires most of the distance. Some of the branch lines that I did not cover I understood had but one wire on. As to this I am not positive. About 769 miles of line were taken over under this contract. The value of that line, that is of the tangible property—poles and wires and telegraph instruments and so on—was supposed to be worth $87,000. That is what we paid for it. It was considered by us to be about the fair physical valuation. I helped make the estimate for it.

Under this contract the Postal Company has maintained
135 two wires for the use of the Railroad Company during the period of the contract. In case of wire trouble where wires have gone down and the trouble is being remedied the Railroad Company gets the first two wires recovered on the line; that has been the practice and it is so provided for by the contract. It has been so since 1907.

I know of several railroads in this country that do their own telegraphing business, that own their own telegraph wires. The Chicago, Milwaukee & St. Paul have a portion of their system, between fourteen and fifteen hundred miles, from Mobridge and Tacoma. According to the tariff book they maintain about 100 commercial offices. The Pennsylvania Railroad East of Pittsburgh. I cannot tell you the approximate mileage of their telegraph lines. The Canadian Pacific Railroad.

I do not know the approximate mileage of telegraph lines maintained by that company. These railroads that I have named as maintaining their own telegraph lines do a public commercial business. They maintain offices along the stations on their line where they receiver commercial messages from the public and transmit them.

Cross-Examination.

I should judge there are approximately 300 railroad companies operated in the United States at this time. The greater number of them have a contract or contracts either with the Postal Company or with the Western Union Company similar in all essentials to the contract of the Postal Company with the Chicago Great Western Company. These contracts have existed between railroad companies and
136 either the Western Union or the Postal Company since practically the inception of telegraphing in this country, for a great many years, that is true. At the inception of the telegraphing business all the telegraph lines were not constructed on railroad rights of way, but it was the endeavor at that time to secure rights of way on railroad companies' rights of way for the construction of such lines. At this time when the railroad company makes an offer to the telegraph company, what we consider a favorable offer, we consider it. It hasn't been the practice of the Postal Company wherever possible to secure a right of way along the right of way of a railroad company in preference to getting one along a highway. That has been the practice with the Western Union. The right of way of the railroad company is generally regarded as being highly desirable for the construction of a telegraph system. It has been and it is to-day. It is not our endeavor now wherever possible to secure a right of way on such a right of way of the railroad company. It has not been our policy to do that for the last ten years. These condemnation proceedings to which I referred were not all prior to ten years ago. Many of them were subsequent. In those cases we were not able by virtue of negotiations with the particular railway company to reach an agreement as to the use of their right of way for our system.

Desiring to have those rights of way and feeling that they were desirable and essential, we condemned them. The figures of $10 a mile which I have said has been the uniform figure for perpetual rights of way on the lines of the railway
137 companies, refers to the figure in the contracts with the

railway companies. Where we condemn a right of way it costs very much less, less than $10 a mile on many of the railroads. We never condemn on a highway. We have condemned individual pieces of property for trimming privileges, etc., along the highway, but no continuous right of way on a highway.

I would judge that the cost of maintenance along the lines of the railway company right of way and on a highway is about the same. As to whether it is a little cheaper along the right of way of a railroad company where the facilities are more accessible, much depends upon the manner in which we can get over the road. If we have facilities on the road for handling material and men it may be better. On the various roads with which we have contracts we have uniform motor car facilities on very few of them. We have on the Great Western. The Great Western Company furnishes motor car service for our men making these repairs and also for the transportation of supplies wherever there is any trouble. The railroad company takes care of the trouble. Is taken care of at once.

We have our stations and linemen very much nearer together on the highway lines than we do on the railroad lines, and we can cover the territory nearly as quickly on an automobile or motorcycle on a highway as we do on a railroad. When you take into consideration the contract and facilities we have furnished us on the railroad it does not follow that our expense on the highway is greater than on the railway. We have a great number of men assigned for repair and maintenance work; not altogether for repair work. We have test offices and linemen in these test offices. We
138 have men stationed at more frequent intervals along a highway than along the railroad. That does not mean a much larger force for repair and maintenance work.

Under the contract the Great Western has the right to the first two wires put back into service when there has been any trouble along the line. Where two wires are recovered one of the wires is frequently given to the Postal Company immediately. That has been the practice for a number of years. If the railroad company needs an exclusive use of those two wires it takes them.

Since 1907 we have endeavored so far as possible to comply with this contract that we have with the Great Western. Since 1907, so far as the operation of this contract has come under the operation of my department I think it has been complied with in all respects by both companies.

There has been during the past several years many instances where supplies were transported by the railroad company for the telegraph company under the terms of this contract; that is being done to-day. I have an annual pass over the Great Western for this year; had one for the last year and the year before that. One year I did not get it. I cannot recall what year. I think I could have gotten it.

There are a great many stations along the line of the Great Western Railroad Company where the Postal Company does not maintain any independent operation. I should say there are not over a dozen points on the Great Western where we maintain an independent operator.

139 There are two wires on the right of way for the exclusive use of the railroad company. The number of wires on the right of way vary from two up to twenty. The railroad company has a number of signal wires and telephone circuits on these same poles. As to telegraph wires the railroad company has but the two.

The number we have varies on different sections of the road. From Chicago to Dubuque we have eight to twelve wires. From there west it is a hard matter for me to give you the number. All over the system we have from two to ten. These wires are classified as through wires and local wires. I cannot answer how many through wires we have. On the through wires business between terminal points only is handled. The Railroad Company never secures the use of those wires, except possibly in some time of trouble. Ordinarily they are reserved exclusively for the use of commercial business of the telegraph company. It is over those wires that the bulk of the commercial business of the telegraph company through that particular section of the country is transmitted.

Mr. Dittus: The defendant rests.

The Court: Let the record show that the defendant rests.

Whereupon The Defendant Rested Its Case.

140 And thereupon the plaintiff to further maintain the issues on its behalf, introduced the following evidence in rebuttal, to-wit:

Mr. Kelly: Now, if the court please, I have here a sheaf of requests for passes and free transportation of material and supplies from the Telegraph Company to the Railroad Company, extending over the past several years, which I under-

stand may be received in evidence, without my having them identified by the officers under whose jurisdiction they come. And may it also be stipulated that the requests for transportation, as contained in these papers, and for the dead-head service on material and supplies, were in all cases complied with.

Mr. Dittus: Oh,—well, yes. I think that is satisfactory.

Mr. Kelly: I will just offer this batch in evidence.

Mr. Dittus: Perhaps it will shorten the record by simply stipulating that there have been requests made, and they have been granted. Then you might introduce a typical letter. It would shorten the record considerably.

The Court: On that point, the witness for the defendant is the only witness who has testified, and as far as I konw, he is pretty well versed on it, and he says that the contract has been lived up to by both sides, as far as they could.

141 Mr. Kelly: I just wanted it in the record, so that I could refer to the fact that the letters and requests are all in substantially the same language. For instance, here is a letter from Mr. Baker's office, under date December 21, 1916, which says: "I beg to list the following outstanding items on our books of freight bills sent to your company on which we should have received dead-head services, under the contract. Kindly advise when we may expect your draft in refund of the improper charges?" Then I have the vouchers.

The Court: Well, they may be received, although—

Mr. Kelly: May it be stipulated that copies may be substituted for the originals.

The Court: Just a minute. It makes your record so very long that I would not put them in, unless there is some dispute. It seems almost unnecessary, as I view it, to put them in. As the court understands the situation, you have a case here where there has been an effort to comply with the law, regardless of whether it was right or not.

Mr. Dittus: If your Honor please, I think perhaps, if that has been the result of this evidence, that Mr. Baker might be recalled. I don't think the intention was for him to conclude or arrive at a conclusion that there was any compliance with the contract, or otherwise. He wanted to state the fact, that this thing has been done, but the net result of this was that we have been charging the Great Western Company with the difference. In other words, we have kept track of

142 all of this stuff that they have furnished, and what we

have furnished, and we have been charging them with the difference.

Mr. Kelly: Only since the date of the Conference Ruling.

Mr. Dittus: Whether that constituted a living up to the contract is questionable. At any rate, that is a legal conclusion.

The Court: Yes, that is certainly a legal conclusion, but in your opening statement, you announced that by reason of the decision of the Circuit Court of Appeals in 1907 of the case in the United States Circuit Court, the question was res adjudicata; and your opposing counsel suggested that in any event since that time both sides had proceeded to comply with the contract, so far as furnishing material and hauling men were concerned.

When this gentlemen was on the stand, Mr. Baker, I asked the question, and he was also asked the question by the counsel whether, so far as he knew, the parties had lived up to or complied with the contract, since 1907. Of course, the purport of my question was up to the time when the Interstate Commerce Commission made this ruling in 1916.

Mr. Kelly: They never kept track before that time.

The Court: The question for the court to decide is whether the action of the parties spelled a new contract. It is also for the court to decide whether the proceedings in the Circuit Court, in 1907, terminated the contract of itself; and also the effect of the existence of the contract, either by the acts of the parties or by their written instrument,
143 whether that is binding in any way at the present time, in view of the Interstate Commerce Commission's ruling of 1916.

Mr. Dittus: Yes, that is my theory.

The Court: I think I have the facts clearly in mind. I understood that it pertained up to the time when you began complying with the ruling of the Interstate Commerce Commission.

Mr. Kelly: I might state that subsequent to that time, we have been complying with this contract, and these requests—why, this very letter from Mr. Baker himself is dated December 21st, 1916.

The Court: I will say, if the Interstate Commerce Commission's ruling is valid, that any attempt on your part to comply with the contract, after their ruling, wont have any bearing upon the ruling of the Interstate Commerce Com-

mission. In other words, parties cannot act in violation of a ruling, if that ruling is valid.

Mr. Kelly: I understand, but my contention is that the ruling is valid, and on that theory, we have gone ahead. And the Postal Company, while they contend it is valid, they have gone ahead, also, and they have complied with this contract.

The Court: It is entirely proper for them to go ahead and ask you to do certain things, in view of the fact that part of the contract is valid, according to them, and part is invalid. They would have to present bills and do certain work for you, because it has not been determined whether it is valid, and they certainly concede that the major portion of it is binding upon them up to this time; and this suit only assails
144 a portion of the contract. So I don't think, in view of what the reporter now has, as to our position, that it is necessary to attach your exhibits at all.

Mr. Kelly: All right. Mr. Perkins, will you take the stand?

G. O. PERKINS, called as a witness on behalf of the complainant, in rebuttal, having been first duly sworn by the court, was examined in chief by Mr. Kelly, and testified as follows:

Am Superintendent of Telegraph and Signals, Chicago Great Western Railroad Company since 1910. My immediate previous employment was in Mexico, Superintendent of Telegraph on the National Railway. Have been engaged in the telegraph business approximately 39 years. Am familiar with the contract between the Postal Company and the Great Western Company. Am in direct charge of the telegraphing that was done over the Great Western; over the telegraph wires, etc., and maintenance work and repair work all comes under my supervision. Under the contract between these companies the Great Western Company furnishes the labor for all maintenance and repair work and the Postal Company furnishes the material. The value of the labor as compared to the value of the material used in maintenance and repair work is about 75 per cent of the total, and the material about 25 per cent. That has been true ever since I have been connected with the Great Western Company. Under the contract at the present time the total mileage of the commercial wires used by the telegraph company is 7101. The two wires re-

served exclusively for the railroad company do not comprise all of the wires used by the railroad. It has wires of its own. Under the contract all the wires used by the railroad comprise 4084 miles. On some of the commercial wires of the tele-
145 graph company only through business is transacted. The commercial tolls collected at stations where no independent operates are maintained by the Postal Company in 1916 amounted to $10,632.22; in 1815 to $12,030.98; in 1914 to $10,695.42. I estimate the cost of maintenance for the parts of the line under the contract at about $32,000 a year, of which the Railroad Company pays $24,000 for labor and the Telegraph Company $8,000 for material.

The messages sent collect over our line and sent paid to our line from the Postal offices amounted to $8,602.84 in 1916; $8,412.27 in 1915; $8,599.54 in 1914. These amounts are in addition to the previous cash receipts which I have mentioned.

Cross-Examination.

The tolls collected at these offices by the Great Western Company on the telegraphing business includes the tolls on messages from the place of origin to the place of destination. I am not referring to the proportion of the toll which would be applicable to the mileage on the Great Western line. I should not say that the greater portion of those tolls are applied to lines off the Railroad Company. I do not know what proportion of those tolls are earned on the lines of the Great Western Company.

Re-direct Examination.

For repair and maintenance work we do not maintain a gang on each division, but we maintain one gang the year round for use wherever needed and in time of emergency we employ as many gangs as are necessary.

146 Whereupon the complainant rested its case in rebuttal.

Which was all the evidence offered or received on the hearing of the above entitled cause.

Forasmuch as the foregoing matters and proceedings do not fully appear of record, and to the end that the same may be made and become of record, the complainant, the Chicago, Great Western Railroad Company, within the time allowed by the court, tenders this its certificate of evidence containing

all of the evidence essential to the decision of the questions presented, which was offered or received upon the trial of the above entitled cause, and prays that the same may be signed, sealed and allowed by the Judge presiding at the trial of said cause in pursuance of the statute in such case made and provided.

All of which is accordingly done this 12th day of October, A. D. 1917.

EVAN A. EVANS,
Judge of the United States Circuit Court of Appeals, sitting as District Judge, presiding at the trial of said cause.

Oct. 12, 1917.
O. K.
J. E. DITTUS,
Counsel for defendant.

(Endorsed) Filed Oct. 12, 1917, T. C. MacMillan, Clerk.

Filed Oct. 14, 1917.

43 And on to-wit: the fourteenth day of August, 1917, there was filed in the clerk's office of said court, in said entitled cause, a certain Opinion in words and figures following to-wit:

44 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois,

Eastern Division.

Chicago Great Western Railroad Company, a corporation, *Plaintiff*, *vs.* Postal Telegraph-Cable Company, a corporation, *Defendant.*	In Equity, No. 735.

Plaintiff in this suit seeks to compel defendant to comply with the terms of a certain contract made December 26, 1888, between the defendant and plaintiff's predecessor, and to restrain the prosecution of certain actions instituted by defendant to collect moneys alleged to be due for services rendered plaintiff by defendant. Sufficient allegations appear in the

bill and are admitted in the answer and were conceded upon the trial to give a court of equity jurisdiction of the cause. In other words, it is conceded that if the contract be upheld, the decree must be for the plaintiff. Opinio Aug

The contract under consideration provided generally for the rendition of service by the parties to this action to each other and was to continue for ninety-nine years from its date. The substance of a very similar contract is set forth at some length in the opinion of the court in deciding the cases of Baltimore & Ohio Railroad Company vs. Western Union Telegraph Company, 241 Fed. 162. Only a few of the more important paragraphs will be quoted. Paragraphs 2, 3, 7 and 8 read as follows:

"II. The Railway Company agrees to furnish all labor necessary for the maintenance, repairs and renewals of said telegraph lines, and for any extensions thereto that may hereafter be made upon property that is now or may hereafter be owned or controlled by the Railway Company, and to furnish office room in its railway stations, and that its railway telegraph operators shall handle the business of the Telegraph Company at all stations along the line of said railway, except at such places as the Telegraph Company may establish a separate office for the better accommodation of the telegraph business of such places. It is understood and
45 agreed, however, that whenever the commercial or public business at any office maintained by the Railway Company shall become greater than can be properly carried on by the operator or operators employed by the Railway Company, then the Telegraph Company shall furnish and pay for its own operating service at such office. And it is agreed that the employes of the Railway Company in the performance of their duties in connection with the maintenance and operation of said telegraph lines, shall observe the rules and regulations of the Telegraph Company applicable thereto, and shall exercise the same care and diligence in the maintenance and repair of the wire or wires that the Telegraph Company has or may have along said railway for its business, and in the transaction of the commercial telegraph business, as in the maintenance and repair of the wire or wires of the Railway Company, and in the transaction of the telegraph business of the Railway Company.

"III. The Railway Company agrees to transport free of charge over its railway, upon application of the superintendent or other officer of the Telegraph Company, employes of the Telegraph Company, when travelling upon the business of

Filed Jan. 4, 1917.

said Company, and also to transport and distribute free of charge along the line of its railway all poles or other material and supplies for the construction, maintenance, renewal, repair and operation of the lines and wires covered by this agreement, and of such additional lines of poles and wires as may be erected under the provisions of this agreement, and also of material and supplies for the establishment, maintenance, and operation of the offices of both parties hereto at places along and adjacent to said railway."

"VII. The Telegraph Company agrees to transmit free over its lines beyond said Railway telegraph lines, business of the Railway Company to the extent of $10,—per mile of railway per annum, including any extensions that may hereafter be made of said railway, such business being charged at the regular rates of the Telegraph Company, and for this purpose the Telegraph Company will issue to said officers of the Railway Company as may be designated by the President, Vice-President, or general manager thereof, annual franks of the Telegraph Company, authorizing such free transmission of messages relating strictly to the railway or corporate business of the Railway Company, originating at or destined to points on the Telegraph Company's line within the United States, either upon or off the line of said railway; and in case the telegraph business of the Railway Company beyond its lines shall amount to more than $10—per mile of railway per annum, the excess shall be paid for at one-half the regular rates of the Telegraph Company. It is understood and agreed, however, that the telegraph service herein provided for, applies only to the transmission of messages concerning business of the Railway Company, and shall not be extended to messages for transmission by ocean cable, nor to messages ordering sleeping car, parlor car, or steamer berths, or other accommodations for customers of the Railway Company, the tolls upon which should properly be chargeable to such customers."

"VIII. It is mutually understood and agreed that the business of the Railway Company shall have precedence over all other business upon the wires set apart for the use of the Railway Company, and that the Railway Company shall have the full use of all the wires now in operation, and of two wires upon any extensions of said railway that may hereafter be made in case the Railway Company require the
46 same, free of charge; but that until the Railway Company shall find it necessary to have the sole use of said wires the Commercial business of the Telegraph Company

shall also be done over the said wires. In case the Railway Company shall require the use of an additional wire or wires for railway business over and above the two wires hereinbefore mentioned, the same shall be paid for by the Railway Company, and in case an additional wire or wires shall be required for commercial business, the same shall be paid for by the Telegraph Company, and in either case, such additional wire or wires shall come in under the terms of this contract as to maintenance, repairs, and renewals. In case the two wires, or either of them, set apart for the use of the Railway Company shall be at any time unfit for use the Railway Company shall have the free use of such of the wires set apart for commercial business as shall be necessary to transact its business until the wires set apart to it shall be put in fit condition for use."

Defendant's counsel attempts to make a distinction between what is termed "on line" service and "off line" service. When the railroad transports material or supplies for use on its own right of way, the service is described as "on line" service. When the carrier transports material or supplies over its road to be used in constructing or repairing the telegraph company's lines beyond the carrier's lines it is "off line" service. When the same company conveys messages to points beyond the lines of the carrier, the service is said to be "off line" service. Defendant assails the present validity of that portion of the contract that calls for the rendition of "off line" service at other than regular rates.

The precise question is this:—Under the laws as they exist today, can a carrier or telegraph company render "off line" service to the other at a rate other than that published in the regular schedules and different from the rates charged the general public?

Plaintiff answers this question in the affirmative and for its authority relies upon an act of Congress enacted June 18, 1910, generally referred to as an amendment to the Interstate Commerce Act.

The material portion of the act relied upon reads as follows:

47 "Section 1. That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity except water and except natural or artificial gas, by means of pipe lines or partly by pipe lines and partly by railroad or partly by pipe lines and partly by water, and to telegraph, telephone and

ed. 1917. cable companies (whether wire or wireless) engaged in sending messages from one State, Territory or District of the United States, or to any other State, Territory or District of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this Act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad. * * *

"All charges made for any service rendered or to be rendered in the transportation of passengers or property and cable, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful. Provided, that messages by telegraph, telephone or cable, subject to the provisions of this Act, may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages: And provided further, That nothing in this Act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers, for the exchange of services."

In support of its contention that the "exchange of service" referred to in this amendment supports the contract in question, reference is made to the court's opinion in the case of Baltimore & Ohio Railroad Company vs Western Union Telegraph Company, 241 Fed. 102, which decision has since been affirmed by the United States Circuit Court of Appeals for the Second Circuit.

In view of this authority, I announce my conclusions, which differ from those of the learned courts whose opinions have been referred to, with some hesitancy.

The history of the times, so far as it pertains to the regulation of commerce, is out of harmony with plaintiff's contention. From 1887, when the Interstate Commerce Act was passed, down to the present time, it has been the evident intent and purpose of Congress to require the railroads to render service at reasonable and uniform rates. While less appreciated generally, the value of uniformity in the rates charged by a common carrier is as great as the advantage that comes from reasonable rates.

48 Not only was it the purpose of Congress to secure uniformity of rates in the act to regulate commerce enacted in 1887, but that intent and purpose has been since frequently

re-expressed in the various amendments to that act that have been passed by this same body. The Hepburn amendment, enacted in 1906, not only expressed such an intent but endeavored to avoid evasions of the law. After this amendment became effective, section 6 of the act to regulate commerce, generally known as the Interstate Commerce Act, read as follows:

"No carrier, unless otherwise provided by this act, shall engage or participate in the transportation of passengers or property, as defined in this act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carried refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs: * * *"

Two decisions by the United States Supreme Court followed shortly thereafter and are particularly enlightening. In the case of Chicago, I. & L. Ry. Co. vs. United States, 219 U. S., 486, the court said:

"The decisive question in this case is whether the contract between the railway company and the Munsey Company is repugnant to the acts of Congress regulating commerce. In other words, could the company, in return for the transportation which it agreed to furnish and did furnish to the Munsey publisher over its interstate lines, and to his employes and to the immediate members of his and their families, accept as compensation for such service anything else than money, the amount to be determined by its published schedule of rates and charges? Upon the authority of Louisville & Nashville R. R. Co. v Mottley, ante, p. 467, just decided, and according to the principles announced in the opinion in that case, the answer to the above question must be in the negative. The acceptance by the railway company of advertising, not of money in the payment of the interstate transportation furnished to the publisher of the Munsey magazine, his employes and the immediate members of his and their families, was for the reasons given in the Mottley case, in violation of the com-

merce act. The facts in the present case show how easily, under any other rule, the act can be evaded, and the ob-
49 ject of Congress entirely defeated. The legislative department intended that all who obtained transportation on interstate lines should be treated alike in the matter of rates, and that all who availed themselves of the services of the railway company (with certain specified exceptions) should be on a plane of equality. Those ends cannot be met otherwise than by requiring transportation to be paid for in money which has a certain value known to all and not in commodities or services or otherwise than in money."

In the case of Louisville & Nashville Railroad Company vs. Mottley, 219 U. S. 467, the court said:

"In our opinion, after the passage of the commerce act the railroad company could not lawfully accept from Mottley and wife any compensation "different" in kind from that mentioned in its published schedule of rates. And it cannot be doubted that the rates or charges specified in such schedule were payable only in money. They could not be paid in any other way, without producing the utmost confusion and defeating the policy established by the acts regulating commerce. The evident purpose of Congress was to establish uniform rates for transportation, to give all the same opportunity to know what the rates were as well as to have the equal benefit of them. To that end the carrier was required to print, post and file its schedules and to keep them open to public inspection. No change could be made in the rates embraced by the schedules except upon notice to the Commission and to the public. But an examination of the schedules would be of no avail and would not ordinarily be of any practical value if the published rates could be disregarded in special or particular cases by the acceptance of property of various kinds, and of such value as the parties immediately concerned chose to put upon it, in place of money for the services performed by the carrier."

"* * * The passenger has no right to buy tickets with services, advertising, releases or property, nor can the railroad company buy services, advertising, releases or property with transportation. The statute manifestly means that the purchase of a transportation ticket by a passenger and its sale by the company shall be consummated only by the former paying cash and by the latter receiving cash of the amount specified in the published tariffs. In the first of the cases last above cited (the Goodridge case) the court, referring to the practice of allowing rebates, said: "So opposed is the policy of the

act to secret rebates of this description that it requires a printed copy of the classification and schedule of rates to be posted conspicuously in each passenger station for the use of the patrons of the road, that every one may be apprised, not only of what the company will exact of him for a particular service, but what it exacts of every one else for the same service, so that in fixing his own prices he may know precisely with what he has to compete. * * *"

The foregoing is but a brief account of the history of railroad rate regulation pertinent to the question under consideration, and a brief statement of the law as it stood in 1910, when the amendment to the act to regulate commerce, re-
50 lied on by the plaintiff, was enacted. The railroads were then without authority to make a contract with a telegraph company or any one else, whereby as carriers they rendered services at rates different from those charged the general public. This state of the law was the result of successive acts of Congress, each succeeding one going further than its predecessor in eliminating discriminating and preferential rates.

It is claimed by the plaintiff, however, that this act of June 18, 1910, amending the act of February 4, 1887, (Comp. st, 1916, sec. 8563, subdivision 3) gave to the carrier the authority which was denied it by the previous acts of Congress as interpreted by the Interstate Commerce Commission and the Supreme Court of the United States.

Examining the history of this amendment, we find that the purpose and object of the legislation was to include telegraph, telephone and cable companies, etc. within the provisions of the act to regulate commerce. The amendment of 1910 was not intended to in any way effect the regulation of railroads. It neither added to nor detracted from the power of carriers in respect to rates. The amendment had for its object the bringing within government regulation quasi-public corporations, somewhat similar in their nature and business to common carriers, and was in harmony with public sentiment throughout the nation voiced by legislation, both state and national. If the carrier did not have the authority to make the contract prior to 1910, it is difficult to see how an act bringing telegraph and telephone companies within the provisions of the law furnished the authority.

But the learned counsel for the plaintiff contends that the amendment was passed by Congress with a full appreciation on its part of the close relation and inter-dependence of telegraph companies and carriers and with a full appreciation of

the difficulty encountered in charging regular rates for the varied services rendered. Appreciating this situation, it
51 is claimed, that the amendment of 1910 expressly ratified the form of contract in existence between most of the telegraph companies and the carriers of the country, which contracts were in all material respects similar to the one here under consideration.

Defendant does not seriously dispute that the effect of this amendment was to ratify the contract so far as "on line" service was concerned, but denies that it gave validity to these contracts so far as "off line" service was concerned.

In view of the defendant's contention, it is interesting to examine the reports of the Commission and the decisions of the courts to determine whether there was in fact a distinction between "on line" service and "off line" service of a carrier.

This court's attention is called to the 21st Annual Report of the Interstate Commerce Commission, page 25, where the commission, speaking of the telegraph railroad contracts said:

"So far as the Commission could see, the full performance of such contracts by the carriers with whom they are made would not effect any public or private interest adversely. Nevertheless, the Commission knows of no provision of law now in force that vests it with authority, or any clause in the law that affords it a reasonable ground to differentiate "off line" service of carriers by telegraph companies by transportation of merchandise or any other form of private property for shippers."

In the case of Santa Fe, Prescott & Phoenix Ry. Co. vs. Grant Bros. Construction Co., 228 U. S. 177, the following language used by Mr. Justice Hughes, speaking for the entire court, is instructive.

"It is clear that in dealing with transportation of this character over its own road, in connection with construction or improvement, a railroad company is not acting in the performance of its duty as a common carrier, and the arrangement for free or reduced-fare carriage for the necessary materials and men used in the work, when it is a part of the contract, entered into in good faith and not as a subterfuge, is not obnoxious to the provisions of law prohibiting departures from the published tariffs, for the reason that such an agreement lies outside the policy of these provisions. See Matter of Railroad-Telegraph Contracts, 12 I. C. C. Rep. 10, 11."

52 Still another decision by the Supreme Court supporting the Interstate Commerce Commission ruling and reversing a decision of the Commerce Court, is that of the In-

terstate Commerce Commission vs Baltimore & Ohio R. R. Co., 225 U. S. 326. The question in that case was whether the railroad company could charge a different rate for transportation of coal to a given point to a railroad than to other shippers, the coal being intended for the use by the railroad as fuel. The court held that the rate charged must be the same as the rate charged other persons for the same service. In that case the court said.

"The circumstances and conditions which may so far be considered as distinguishing traffic so as to take from different transportation charges the vice of preference, have been described by this court. In Wright vs. United States, 167 U. S. 512, 518, it is said: 'It was the purpose of the section (2) to enforce equality between shippers and it prohibits any rebate or any device by which two shippers shipping over the same line, the same distance, under the same circumstances of carriage are compelled to pay different prices therefor.'"

Again the court said:

"It is admitted that the fact that the railroad is the shipper or consumer is not a circumstance or condition that effects the carriage nor can the different uses to which the coal may be put, and it would seem necessarily that any other extraneous condition or circumstance could have no greater potency. Once depart from the clear directness of what relates to the carriage only and we may let in considerations which may become a cover for preferences. * * * It must be kept in mind that it is not the relation of one railroad to another with which we may have any concern, but the relation of the railroad to its patrons, who are entitled to equality of charges."

The amendment of 1910 made the telegraph and telephone companies common carriers within the meaning and purpose of the act to regulate commerce. The amendment did not in any way modify section 6 of the act to regulate commerce, as amended by the act of June 28, 1906, which expressly provided:

"Nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time."

53 The difficulty experienced in determining the value of its service, and the inability of the carrier to classify such service as it renders the telegraph company, referred to by the

plaintiff's attorney, applies to "on line" service only. No difficulty should be experienced by the carrier in charging the telegraph company its regular rates for transporting material over its line to be delivered to a connecting carrier for further conveyance. In this respect it acts as a common carrier and in reason and justice should comply with that cardinal rule of railroad rate regulation, namely, that all rates shall be uniform and the same to all patrons.

The plaintiff's counsel, with much zeal and commendable industry, has collected a large number of definitions of the word "exchange," while defendant's counsel has also furnished the court with a number of definitions of that word. While not unmindful of the value of lexicons in a case like the present, the court is satisfied that the correct construction to be placed upon the term "exchange of service" cannot be gathered from dictionaries alone.

If this court were to adopt the construction given by the plaintiff's attorney, it would impute to Congress a reversal of its settled policy and give validity to a contract which at common law was contrary to public policy. Congress, in passing this amendment, acted in the light of judicial construction of similar legislation and was aided by the conference rulings of the body delegated by it to enforce the law it was about to enact. In the face of the history of railroad legislation, this court is not justified in construing a phrase so as to permit a common carrier, acting as such, to render service to one patron at rates different from those charged other patrons, when a different construction is reasonably open.

Under all the circumstances, the court concludes that the "exchange of service" referred to in the amendment of 1910 validated the contract so far as it pertained to "on line" service, but such act did not validate the contract so far as it provided for compensation other than regular rates when either company rendered the other "off line" service.

The fact that the contract may have been valid when executed will not overcome the effect of the amendment of 1906, which clearly prohibited such contracts as are here sought to be enforced. New York Central & Hudson River Railroad Co. vs. Gray, 239 U. S. 583. C. I. & L. Railway Co. vs. United States, supra.

In reaching this conclusion, no consideration has been given the conference rulings of the Interstate Commerce Commission made since the enactment of the amendment of 1910. These rulings, while not conclusive (Atchison, Topeka & Santa Fe. Ry. Co. vs. United States, decided June 4, 1917),

are entitled to great weight and should not be lightly overruled. Opin

On June 8, 1912, the Commission approved its conference ruling No. 364, which is as follows:

"Exchange of services by telegraph and railroad companies * * * Under the amendatory act of June 18, 1910, it is provided "That nothing in this act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers for the exchange of services." Upon inquiry: Held, That a railroad company and a telegraph company may exchange services with respect to strictly company matters on the basis of their agreements."

On July 15, 1914, the Commission approved the following conference ruling:

"Upon inquiry as to whether or not, under the provision of Section 1, 'That nothing in this act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers, for the exchange of services,' a railroad may contract with a telegraph company (including in that term 'telephone, telegraph and cable companies') to transport the property of such telegraph company, whether for use on the line of said railroad or merely to be transported over such line for use elsewhere, at a different rate from that applicable to such transportation under section 6 of the act: Held, That while said carriers may contract for an exchange of services, such services must be exchanged upon the basis of the lawful rates of said railroad, as published and filed in accordance with the provisions of section 6 of the act, and of the reasonable charges of said telegraph company regularly charged other customers for similar services; except that said carriers may contract, without reference to said lawful rates and charges, for the transportation by said railroad for said telegraph company of the property of the latter over the line of the former when such property is to be used along the line of said railroad and in the construction, improvement, or operation of said railroad—that is to say, when such transportation is not conducted by said railroad as a common carrier."

This ruling was re-affirmed on March 26, 1916.

Surely the conclusions of the body delegated by Congress to enforce the statute, is entitled to great weight in a case like the present. The rulings of administrative bodies charged with the enforcement of certain statutes have very generally been given careful consideration and credit by the

ed 1917. courts. Pennell vs. Philadelphia & Reading Ry. Co., 231 U. S. 675. United States vs Trans-Missouri Freight Association, 166 U. S. 290.

The contract in the present case was modified some years after it was made, but the rights of the parties so far as this case is concerned, were not changed in any respect by the modification.

The contract, so far as it provides for compensation for "off line" service at rates other than those charged the general public, is invalid. Plaintiff's bill must be dismissed. Let a decree be so entered.

Dated, Chicago, August 14, 1917.

(Signed) EVAN A. EVANS
Acting District Judge.

(Endorsed) Filed Aug. 14, 1917, T. C. MacMillan, Clerk.

1917. 56 And on to-wit: the fourteenth day of September, 1917, in the record of proceedings in said entitled cause, before the Hon. Evan A. Evans, Circuit Judge, appears the following entry to-wit:

Chicago Great Western Railroad Company, a corporation,
vs.
Postal Telegraph-Cable Company, a corporation.
} 735.

This cause having come on to be heard at this term of court upon the amended bill of complaint herein, the answer thereto and the replications of such complainant to said answer and the proof taken in said cause having been argued by counsel for the respective parties, and the court having duly considered the same and in consideration thereof the court having found that the equities in this case are with the defendant and that the bill of complaint of the complainant is without equity.

It is therefore Ordered, Adjudged and Decreed as follows, viz:

That the bill of complaint, as amended, be and the same hereby is dismissed for want of equity at complainant's costs to be taxed herein.

EVAM A. EVANS,
Judge.

57 And on towit: the fourteenth day of September, 1917, came the complainant in said entitled cause by its solicitors and filed in the clerk's office of said court, its certain petition for appeal and assignment of errors in words and figures following to-wit:

58 IN THE DISTRICT COURT OF THE UNITED STATES,

Northern District of Illinois,

Eastern Division.

Chicago Great Western Railroad Company, a corporation, *Plaintiff*, *vs.* Postal Telegraph-Cable Company, a corporation, *Defendant*.	In Equity No. 735.

PETITION FOR ORDER ALLOWING APPEAL.

The above named plaintiff, Chicago Great Western Railroad Company, conceiving itself aggrieved by the decree entered on September 14th, 1917, in the above entitled cause, dismissing the appeal of the plaintiff as amended for want of equity, does hereby appeal from said decree to the Circuit Court of Appeals of the United States for the Seventh Circuit, and it prays that this, its appeal, may be allowed; and that a transcript of the record and proceedings and papers upon which said decree was made may be sent to the Circuit Court of Appeals of the United States for the Seventh Circuit.

WINSTON, PAYNE, STRAWN & SHAW,
Solicitors for Plaintiff.

(Endorsed) Filed Sep. 14, 1917, T. C. MacMillan, Clerk.

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1917.

ASSIGNMENT OF ERRORS.

IN THE DISTRICT COURT OF THE UNITED STATES,

Northern District of Illinois,

Eastern Division.

Chicago Great Western Railroad Company, a corporation, *Plaintiff*, *vs.* Postal Telegraph-Cable Company a corporation, *Defendant*.	In Equity No. 735

Assignment of Errors.

Now comes plaintiff and respectfully shows that the court in the proceedings and decree in the above entitled cause committed manifest error in each of the following respects:

1. The district court erred in denying an injunction as prayed in plaintiff's bill of complaint as amended, and in dismissing said bill for want of equity.

2. The district court erred in not granting an injunction as prayed in plaintiff's bill of complaint as amended.

3. The district court erred in holding that the contracts of December 26th, 1888, and February 5th, 1902, made by and between the defendant and the predecessor companies of this plaintiff, the Chicago, St. Paul and Kansas City Railway Company and the Chicago Great Western Railway Company, were invalid in so far as said contracts provided for compensation for "off line" services at rates other than those charged the general public.

4. The district court erred in holding that said contracts of December 26th, 1888, and February 5th, 1902, made by and between the defendant and the predecessor companies of this plaintiff, the Chicago, St. Paul and Kansas City Railway Company and the Chicago Great Western Railway
60 Company were not valid and subsisting contracts binding upon said defendant and enforcible against it, in so far as said contracts provided for compensation for "off line" services at rates other than those charged the general public.

5. The district court erred in holding that the amendment of June 18th, 1910, amending the act of February 4th, 1887,

(Compiled Statutes 1916, Section 6563, Subdivision 3), did not validate the said contracts of December 26th, 1888, and February 5th, 1905, in so far as said contracts provided for compensation at other than regular rates when either the plaintiff or the defendant rendered "off line" services.

6. The district court erred in holding that under the Act to Regulate Commerce as amended, common carriers by railroad and telegraph companies cannot render "off line" service to the other at a rate other than that published in the regular schedules, and different from the rates charged the general public.

7. The district court erred in denying an injunction as prayed in plaintiff's bill of complaint as amended, enjoining and restraining the defendant from prosecuting the suits at law now pending in the Municipal Court of the City of New York, and in the Appellate Division of the Supreme Court of New York between the defendant and this plaintiff, and restraining and enjoining the defendant from bringing any action of any kind against this plaintiff arising in or from the collection of telegraph tolls, except such as may arise from or under the said contracts of December 26th, 1888, and February 5th, 1902.

8. The district court erred in denying an injunction as prayed in plaintiff's bill of complaint as amended, requiring the defendant to continue to furnish to the plaintiff, its officers, agents and employes the telegraphic service provided for in said contracts of December 26th, 1888, and February 5th, 1902.

61 9. The district court erred in admitting in evidence, over the objections of the plaintiff, the certificate of the Postmaster General certifying that the defendant had accepted all the restrictions and obligations required by law, said certificates being marked Defendant's Exhibit No. 1.

10. The district court erred in admitting in evidence, over the objections of the plaintiff, transcript of record in the case of John A. Humbird et al, vs. Chicago Great Western Railway Company, said transcript being marked Defendant's Exhibit 2.

11. The district court erred in admitting in evidence, over the objections of the plaintiff, evidence as to the amount of telegraphing done by the defendant for the plaintiff during the years 1914 and 1915, and evidence as to the transportation of material by the plaintiff for the defendant in the year 1915.

nt of filed 1917. 12. The district court erred in admitting in evidence, over the objections of the plaintiff, evidence of the witness Baker as to the manner of securing rights of way for the defendant.

13. The district court erred in not granting an injunction restraining the defendant as prayed in plaintiff's bill of complaint as amended, during the pendency of this appeal.

Wherefore the plaintiff prays that said decree be reversed.

WINSTON, PAYNE, STRAWN & SHAW,
Solicitors for Plaintiff.

(Endorsed) Filed Sep. 14, 1917, T. C. MacMillan, Clerk.

Sept. 62 And on the same day, to-wit: the fourteenth day of September, 1917, in the record of proceedings in said entitled cause, before the Hon. Evan A. Evans, Circuit Judge, appears the following entry to-wit:

Chicago Great Western Railroad Company, a corporation,
vs.
Postal Telegraph Cable Company, a corporation. } 735.

This cause coming on for hearing this 14th day of September, 1917, upon application for an appeal by the plaintiff, together with its assignment of errors, an appeal is hereby allowed and bond for appeal is hereby fixed in the sum of five ($500) dollars, and said plaintiff is hereby given 30 days in which to present and file its certificate of evidence herein.

EVAN A. EVANS,
Judge.

63 And on the same day to-wit: the fourteenth day of September, 1917, there was filed in the clerk's office of said court a certain Bond of Appeal, in words and figures following to-wit.

64 IN THE DISTRICT COURT OF THE UNITED STATES,

Northern District of Illinois,

Eastern Division.

Chicago Great Western Railroad Company, a corporation, *Plaintiff*,
vs.
Postal Telegraph-Cable Company, a corporation, *Defendant*.
} In Equity No. 735

APPEAL BOND.

Know All Men By These Presents, that Chicago Great Western Railroad Company, a corporation, as principal and George A. Kelly, as surety, are held and firmly bound unto the Postal Telegraph-Cable Company, defendant, in the full and just sum of five hundred ($500.00) Dollars, to be paid the said defendant, its successors or assigns, for which payment well and truly to be made, we bind ourselves, our successors and assigns jointly and severally by these presents.

Witness the hands and seals of the parties hereto this 14th day of September, A. D. 1917.

The condition of the above obligation is such that whereas the above named Chicago Great Western Railroad Company has prayed and has been allowed an appeal to the Circuit Court of Appeals of the United States for the Seventh Circuit to reverse the decree entered in the above entitled cause by the District Court of the United States for the North-
65 ern District of Illinois, Eastern Division, on September 14th, 1917.

Now, if the above named Chicago Great Western Railroad Company shall prosecute its said appeal to effect, and answer all damages and costs if it fail to make good its appeal, then

the above obligation to be void, otherwise to remain in full force and virtue.

CHICAGO GREAT WESTERN RAILROAD COMPANY,
By S. M. FELTON,
President.

(Seal)
Attest:
J. T. COYKENDALL,
Secretary.

GEORGE A. [illegible],
By .....

Approved this 14th day of Sep. 1917.

EVAN A. EVANS,
Judge.

O. K.
J. E. DITTUS,
Atty for Deft.

(Endorsed) Filed Sep. 14, 1917, T. C. MacMillan, Clerk.

Sept. 66 And on the same day to-wit: the fourteenth day of September, 1917, in the record of proceedings in said entitled cause, before the Hon. Evan A. Evans, Circuit Judge, appears the following entry to-wit:

Chicago Great Western Railroad Company, a corporation,
vs.
Postal Telegraph Cable Company, a corporation.
} 735.

This cause coming on to be heard on the motion of the plaintiff for an order granting an injunction as prayed in the plaintiff's bill of complaint as amended, pending an appeal herein, and the same arguments having been suggested to the court in support of this motion that were suggested by and on behalf of the plaintiff on the application for a permanent injunction at the final hearing, and the court having heard the arguments of counsel, and being fully advised in the premises, denies the said motion and declines to grant the order for an injunction pending an appeal.

To which action of the court the plaintiff then and there duly excepted.

EVAN A. EVANS,
Judge.

147 IN THE DISTRICT COURT OF THE UNITED STATES,

Northern District of Illinois,

Eastern Division.

Chicago Great Western Railroad Company, a corporation, *Plaintiff*, *vs.* Postal Telegraph-Cable Company, a corporation, *Defendant*.	In Equity No. 735

PRAECIPE FOR RECORD.

To the Clerk of the Above Entitled Court:

You will please prepare a transcript of record in this cause to be filed in the office of the clerk of the Circuit Court of Appeals of the United States for the Seventh Circuit, under the appeal heretofore allowed by the District Court of the United States for the Northern District of Illinois, Eastern Division, and include in the said transcript the following pleadings, proceedings and papers on file:

1. The plaintiff's bill of complaint as amended, the answer of the defendant to the bill of complaint as amended, and reply of the plaintiff to the answer of the defendant to the bill of complaint as amended.
2. All motions, material orders and decrees filed.
3. Certificate of evidence.
4. Opinion of the district court.
5. Petition for order allowing appeal, order allowing appeal, assignment of errors and appeal bond and order denying motion for an injunction pending appeal.

WINSTON, PAYNE, STRAWN & SHAW,
Solicitors for Plaintiff.

Received a copy of the foregoing praecipe for record this 14 day of September, 1917.

JACOB E. DITTUS,
Solicitors for Defendant.

(Endorsed) Filed Sep. 14, 1917, T. C. MacMillan, Clerk.

148 Northern District of Illinois, } ss.
Eastern Division. }

I, T. C. MacMillan, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete Transcript of the proceedings had of record in said Court, made in accordance with Praecipe filed in the cause entitled Chicago Great Western Railway Company, versus Postal Telegraph-Cable Company, Equity No. 735, as the same appear from the original Records and Files thereof, now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in the City of Chicago, in said District, this twelfth day of November, A. D. 1917.

T. C. MacMillan,
Clerk.

(Seal)

United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit; do hereby certify that the foregoing printed pages, numbered from 1 to 104, inclusive, contain a true copy of the printed record, printed under my supervision, and filed January 4, 1918, on which this cause was argued, heard and determined in the case of Chicago Great Western Railroad Company vs. Postal Telegraph-Cable Company, No. 2548, October Term, 1917, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this twenty-second day of March A. D. 1918.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

At a Regular Term of the United States Circuit Court of Appeals for the Seventh Circuit, Begun and Held in the United States Courtroom in the City of Chicago in said Seventh Circuit, on the Second Day of October, 1917, of the October Term, in the Year of Our Lord One Thousand Nine Hundred and Seventeen and of Our Independence the One Hundred and Forty-second Year.

And afterwards, to-wit: On the sixteenth day of November, 1917, in the October term aforesaid, came the appellant, by its counsel, Mr. John Barton Payne, Mr. Ralph M. Shaw and Mr. George A. Kelly, and filed in the office of the Clerk of this Court their appearance, which appearance is in the words and figures following, to-wit:

United States Circuit Court of Appeals for the Seventh Circuit,
October Term, 1917.

No. 2548.

CHICAGO GREAT WESTERN RAILROAD CO., Appellant,

vs.

POSTAL TELEGRAPH-CABLE CO., Appellee.

The Clerk will enter my appearance as counsel for the appellant.

JOHN BARTON PAYNE.
RALPH M. SHAW.
GEORGE A. KELLY.

Endorsed: Filed Nov. 16, 1917. Edward M. Holloway, Clerk.

And afterwards, to-wit: On the nineteenth day of November, 1917, in the October term last aforesaid, came the appellee, by its counsel, Mr. Jacob E. Dittus, and filed in the office of the Clerk of this Court his appearance, which appearance is in the words and figures following, to-wit:

United States Circuit Court of Appeals for the Seventh Circuit, October Term, 19—.

No. 2548.

CHICAGO & GREAT WESTERN RAILROAD CO., Appellant,

vs.

POSTAL TELEGRAPH-CABLE CO., Appellee.

The Clerk will enter my appearance as counsel for the appellee.

JACOB E. DITTUS,
1801 *Conway Bldg., Chicago.*

Endorsed: Filed Nov. 19, 1917. Edward M. Holloway, Clerk.

And afterwards, to-wit: On the twenty-second day of January, 1918, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

TUESDAY, January 22, 1918.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Christian C. Kohlsaat, Circuit Judge.
Hon. Samuel Alschuler, Circuit Judge.
Edward M. Holloway, Clerk.
John J. Bradley, Marshal.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

2548.

CHICAGO AND GREAT WESTERN RAILROAD COMPANY

vs.

POSTAL TELEGRAPH CABLE COMPANY.

Now this day come the parties by their counsel, and counsel for appellant now presents a motion for an extension of time to file its brief and the Court having heard the oral arguments of Mr. Ralph M. Shaw, counsel for appellant in support of said motion, and by Mr.

Jacob E. Dittus, counsel for appellee, in opposition thereto, it is ordered that brief for appellant be filed within three days and that brief for appellee be filed by February 6, 1918, and cause is hereby set down for hearing on February 6, 1918.

And afterwards, to-wit: On the sixth day of February, 1918, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

WEDNESDAY, February 6, 1918.

Court met pursuant to adjournment and was opened by proclamation of crier:

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Christian C. Kohlsaat, Circuit Judge.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Edward M. Holloway, Clerk.
John J. Bradley, Marshal.

Before:

Hon. Francis E. Baker, Circuit Judge.
Hon. Christian C. Kohlsaat, Circuit Judge.
Hon. Samuel Alschuler, Circuit Judge.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

2548.

THE CHICAGO AND GREAT WESTERN RAILROAD COMPANY

vs.

POSTAL TELEGRAPH-CABLE COMPANY.

It is ordered by the Court that the Inter-State Commerce Commission may file a brief in this cause.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

2548.

THE CHICAGO AND GREAT WESTERN RAILROAD COMPANY

vs.

POSTAL TELEGRAPH-CABLE COMPANY.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel

and on oral arguments by Mr. Ralph M. Shaw, counsel for appellant, and by Mr. Jacob Dittus, counsel for appellee, and by Mr. Albert L. Hopkins, counsel for Interstate Commerce Commission, and the Court having heard the same, takes this matter under advisement.

And afterwards, to-wit: On the twenty-eighth day of February, 1918, in the October term last aforesaid, there was filed in the office of the Clerk of this Court, the Opinion of the Court in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1917, January Session, 1918.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

No. 2548.

CHICAGO GREAT WESTERN RAILROAD COMPANY, Appellant,

vs.

POSTAL TELEGRAPH-CABLE COMPANY, Appellee.

Before Baker, Kohlsaat and Alschuler, Circuit Judges.

BAKER, *Circuit Judge*, delivered the opinion of the court.

In 1888 the parties entered into a railroad-telegraph contract for exchange of services. They renewed it after the 1910 amendment of the Interstate Commerce Act and faithfully observed its terms until after the Interstate Commerce Commission's conference ruling of March 28, 1916. In essential scope the contract in suit is the same as one set forth in Baltimore & O. Rld. Co. v. Western Union Tel. Co., 241 Fed. 162. That case (affirmed, same title, 242 Fed. 914) is also referred to for a recital of amendments of the Interstate Commerce Act and of various pronouncements of the Interstate Commerce Commission.

Appellant unsuccessfully prosecuted this suit to enjoin appellee's repeated actions at law to collect full rates for "off line" telegrams and to compel appellee to accept railroad service in exchange under the contract.

As the Western Union case is pending in the Supreme Court, we have taken this case now only on the representations of the Postal Company that there are important facts in this record which were not adduced in the Western Union case and that it would be advantageous to have both records before the Supreme Court at the same time.

We find no additional facts that in our judgment enlarge or change the questions for decision. They arise from the following provisions in the Interstate Commerce Act:

"Nothing in this act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers for the exchange of services."

"This provision (against passes and free transportation) shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for the officers, agents, employees and their families of such telegraph, telephone, and cable lines, and the officers, agents, employees and their families of other common carriers subject to the provisions of this act."

We approve and adopt the propositions declared in the Western Union case, substantially as follows:

(*a*) "Exchange" means the giving of one thing for another. It excludes the idea of first measuring the respective things in money value and then settling or paying any difference. To construe the act in its entirety as requiring a reference to monetary scales is to render the proviso meaningless. "Exchange" and "services" are without any limitation or qualification put upon them by the language employed by Congress; and therefore the companies may lawfully give, each to the other, any service of the kinds they perform for the public. As the language is clear, direct and unambiguous, there is no warrant for the interpolation of a distinction between "on line" and "off line" services.

(*b*) Congress adopted the amendment of 1910 in the light of public history, showing that generations ago the railroad and the telegraph started and have since continued hand in hand as co-servitors of the public under the well-known reciprocal contracts which were first challenged a few years prior to 1910. Congressional purpose in the 1910 amendment, therefore, was to end the challenge.

Additionally we suggest:

(*c*) Emphasis may be given to "contract" as well as to "exchange" and "service." Full and unrestricted right to contract with each other is what the plain language of the proviso gives. If one may deal with the other for "off line" service only as the Interstate Commerce Act compels carriers to deal with the public, then no contract rights, as distinguished from legislatively declared legal obligations, can exist, and the grant of power is in that respect emasculated.

(*d*) So entwined and interdependent are the reciprocal obligations and undertakings that no part of the contract is separable from the others. Inasmuch as Congress supposedly was aware of this situation, a confession by appellee that Congress intended to legitimatize the exchange of "on line" services is a confession, in our judgment, that Congress had the intent to approve the known exchange of services rather than the intent to split the unsplittable and from the fragments to make for the parties a new contract.

(*e*) Telegraph companies were not brought under control to the same extent as railroad companies. For the latter, rates may be fixed; respecting the former, there was only the bringing into national law of the common law requirement that rates be reasonable. If a telegraph company should believe that a published railroad rate for "off line" service was unreasonable, it could go before the Interstate Commerce Commission and that body could fix a reasonable rate. But, places changed, the railroad company could only contest in court the reasonableness of a particular rate for services already rendered, with the telegraph company free to promulgate new rates according to its own judgment of reasonableness. Did Congress in-

tend that this inequality of situation should control? Or did not Congress rather intend that their mutual agreements for exchange of services should prevail?

(*f*) "Evils to be remedied," as a part of "the history of the times," may be looked to in confirmation of the unambiguous language of the proviso. We perceive no evils in the contracts, no injury to the public; appellee suggests none; and the Interstate Commerce Commission in 1906 reported that "So far as we now see, the full performance of such contracts by the carriers with whom they are made would not affect any public or private interest adversely." 12 I. C. C. 10.

(*g*) Appellee is a telegraph company. But cable companies are included in the same terms. Appellee enumerates "on line" services it renders for appellant; but so far has failed to state how an undersea cable could be of "on line" service to a railroad, or how a railroad could be of "on line" service to a cable. Appellee's contention that the proviso authorizes nothing but contracts for exchange of "on line" services (services on a common or joint right of way) therefore comes to this: Railroad and cable companies are authorized to contract with each other, but only for the performance of unperformable conditions.

(*h*) Appellee's contest arose wholly over compensation for telegraphic messages. Under the second proviso hereinabove quoted appellee could lawfully issue telegraphic franks to the officers and agents of appellant. But is it unlawful to do under contract and for compensation what may lawfully be done without contract and without compensation?

Decree reversed, with direction to grant the prayers of the bill.

A true Copy.

Teste:

_____,

Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

And afterwards, on the same day, to-wit: On the twenty-eighth day of February, 1918, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

THURSDAY, February 28, 1918.

Court met pursuant to adjournment.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Christian C. Kohlsaat, Circuit Judge.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Edward M. Holloway, Clerk.

Before:

Hon. Francis E. Baker, Circuit Judge.
Hon. Christian C. Kohlsaat, Circuit Judge.
Hon. Samuel Alschuler, Circuit Judge.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

2548.

CHICAGO GREAT WESTERN RAILROAD COMPANY

vs.

POSTAL TELEGRAPH-CABLE COMPANY.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby reversed with costs; and that this cause be, and the same is hereby remanded to the said District Court with direction to grant the prayers of the bill.

And afterwards, to-wit: On the twelfth day of March, 1918, in the October term last aforesaid, there was filed in the office of the Clerk of this Court a certain Assignment of Errors, which said Assignment of Errors is in the words and figures following, to-wit:

United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1918, January Session, 1918.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

No. 2548.

CHICAGO GREAT WESTERN RAILROAD COMPANY, Appellant,

vs.

POSTAL TELEGRAPH-CABLE COMPANY, Appellee.

Assignment of Errors.

The Postal Telegraph-Cable Company, appellee in this court and appellant in this appeal to the United States Supreme Court in the above entitled cause, in connection with its petition for appeal herein, presents and files therewith its assignment of errors, as to which matters and things it says that the order and decree entered herein on February 28, 1918 is erroneous, to-wit:—

1. The court erred in reversing the decree made by the United States District Court, for the Northern District of Illinois, Eastern Division, entered on the 14th day of September, A. D. 1917 wherein and whereby it was ordered that the bill of complaint as amended be and the same is hereby dismissed for want of equity and complainant's costs to be taxed herein.

2. The court erred in reversing the decree made by the United States District Court, for the Northern District of Illinois, Eastern Division, on the 14th day of September, A. D. 1917 and directing said court to grant the prayers of the bill.

3. The court erred in not affirming the decree of the District Court of the United States, for the Northern District of Illinois, Eastern Division, entered in said cause on the 14th day of September, A. D. 1917.

4. The order of the United States Circuit Court of Appeals for the Seventh Circuit, reversing the decree of the United States District Court, for the Northern District of Illinois, Eastern Division, with directions to grant the prayers of the bill, is contrary to the law and the evidence in this case.

Wherefore the said Postal Telegraph-Cable Company prays that said order of the United States Circuit Court of Appeals, in and for the Seventh Circuit, may be reversed and that the decree of the District Court of the United States, for the Northern District of Illinois, Eastern Division, in said cause may be affirmed.

Dated March 8, 1918.

JACOB E. DITTUS,
Solicitor for Postal Telegraph-Cable Co., Appellant.

WM. W. COOK,
Of Counsel.

Endorsed: Filed Mar. 12, 1918. Edward M. Holloway, Clerk.

And afterwards, on the same day, to-wit: On the twelfth day of March, 1918, in the October term last aforesaid, there was filed in the office of the Clerk of this Court a certain Petition for Appeal, which said Petition for Appeal is in the words and figures following, to-wit:

United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1917, January Session, 1918.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

No. 2548.

CHICAGO GREAT WESTERN RAILROAD COMPANY, Appellant,

vs.

POSTAL TELEGRAPH-CABLE COMPANY, Appellee.

The above named appellee, Postal Telegraph-Cable Company, conceiving itself aggrieved by the order and decree made and entered by the above named court in the above entitled cause under date of February 28, 1918, wherein and whereby the decree of the District Court of the United States, for the Northern District of Illinois, Eastern Division, in said cause was reversed with directions to grant the prayer of the complainant's bill, the decree of said District Court so reversed having ordered that said complainant's bill be dismissed for want of equity, and this being a case in which a judgment or decree of said Circuit Court of Appeals is not made final and that the matter in controversy in this suit exceeds $1,000.00 besides costs, does hereby appeal from said order of the Circuit Court of Appeals reversing said decree of the District Court, with directions to grant the prayer of the complainant's bill, to the Supreme Court of the United States for the reasons specified in the assignment of errors filed herein, and it prays that this appeal may be allowed, directing the clerk of the United States Circuit Court of Appeals, for the Seventh Circuit, to send the record, proceedings and papers in said cause, with all other things concerning the same, to the Supreme Court of the United States in order that the errors complained of in the assignment of errors herewith filed may be reviewed and if error be found, corrected according to the laws and customs of the United States.

JACOB E. DITTUS,
Solicitor for Postal Telegraph-Cable Co.

WM. W. COOK,
Of Counsel.

Endorsed: Filed Mar. 12, 1918. Edward M. Holloway, Clerk.

And afterwards, on the same day, to-wit: On the twelfth day of March, 1918, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

TUESDAY, March 12, 1918.

Court met pursuant to adjournment.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Christian C. Kohlsaat, Circuit Judge.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Edward M. Holloway, Clerk.

Before:
Hon. Samuel Alschuler, Circuit Judge.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

2548.

CHICAGO GREAT WESTERN RAILROAD COMPANY

vs.

POSTAL TELEGRAPH-CABLE COMPANY.

Upon the foregoing petition, it is hereby ordered that the appeal in the above entitled cause to the Supreme Court of the United States, be and the same is hereby allowed as prayed, on filing appeal bond in usual form in penal sum of $500, with surety to be approved by the Clerk of this Court.

And afterwards, to-wit: On the twenty-second day of March, 1918, in the October term last aforesaid, there was filed in the office of the Clerk of this Court a certain Bond on Appeal, which said Bond on Appeal is in the words and figures following, to-wit:

Bond #12084.

Know all men by these presents, That we, Postal Telegraph-Cable Company, a corporation, as principal, and Massachusetts Bonding and Insurance Company, as surety, are held and firmly bound unto Chicago Great Western Railroad Company, a corporation, in the full and just sum of Five Hundred ($500.00) Dollars to be paid to the said Chicago Great Western Railroad Company, its certain attorney, successors or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents. Sealed with our seals and dated this 14th day of March in the year of our Lord One thousand nine hundred and eighteen.

Whereas, The Postal Telegraph-Cable Company has prosecuted an appeal to the Supreme Court of the United States from the decree of the United States Circuit Court of Appeals, Seventh Circuit, entered on or about the 28th day of February, A. D. 1918, in a suit de-

pending in said court between said Chicago Great Western Railroad Company, as appellant, and said Postal Telegraph-Cable Company, as appellee.

Now, the condition of the above obligation is such, That if the said Postal Telegraph-Cable Company shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

[SEAL.] POSTAL TELEGRAPH-CABLE COMPANY,
By CHAS. P. BRUCH,
Vice President.

WM. B. DUNN,
A. B. PARRISH.

MASSACHUSETTS BONDING AND INSURANCE COMPANY, [SEAL.]
By PHILIP B. SHILLITO,
Attorney-in-Fact.
HERMAN W. BORCHERS,
Attorney-in-Fact.

Approved by:

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

Endorsed: Filed Mar. 22, 1918. Edward M. Holloway, Clerk.

United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten and printed pages, numbered from 1 to 16, inclusive, contain a true copy of the proceedings had and papers filed (except the briefs of counsel) in the case of Chicago Great Western Railroad Company vs. Postal Telegraph-Cable Company No. 2548, October Term, 1917, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this twenty-second day of March A. D. 1918.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

UNITED STATES OF AMERICA, *ss:*

President of the United States to Chicago Great Western Railroad Company:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States in the City of Washington, in the District of Columbia, thirty days after the date of this citation, pursuant to an appeal allowed and filed in the clerk's office of the United States Circuit Court of Appeals, for the Seventh Circuit, wherein the Postal Telegraph-Cable Company is appellant and you are appellee, to show cause, if any there be, why the decree rendered against said appellant as in said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court, this 22nd day of March, in the year of our Lord One Thousand Nine Hundred and eighteen.

Allowed by

KOHLSAAT,
Judge of the United States Circuit Court of Appeals, Seventh Circuit.

Service of a copy of the within citation is this day admitted. Dated at Chicago, Illinois, March 22, 1918.

RALPH M. SHAW,
GEORGE A. KELLY,
Attorneys for Chicago Great Western Railroad Company, Appellee.

[Endorsed:] No. 2548. United States Circuit Court of Appeals, 7th Cir. Chicago Great Western Railroad Co. vs. Postal Telegraph-Cable Co. Citation. Filed Mar. 22, 1918. Edward M. Holloway, Clerk. Jacob E. Dittus, Att'y for Appellee.

Endorsed on cover: File No. 26,426. U. S. Circuit Court of Appeals, 7th Circuit. Term No. 959. Postal Telegraph-Cable Company, appellant, vs. Chicago Great Western Railroad Company. Filed April 10th, 1918. File No. 26,426.